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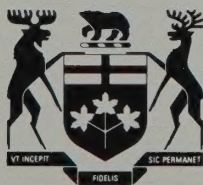
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ONTARIO LABOUR RELATIONS BOARD REPORTS

July 1988



Ontario

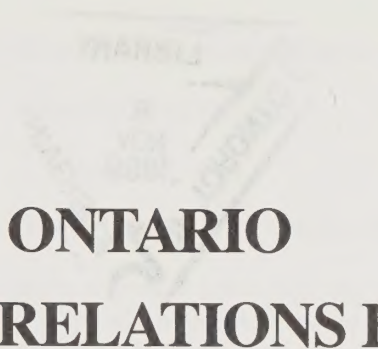
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. JULY

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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NOTICE OF REVISED PRACTICE NOTE

PRACTICE NOTE #15

August 2, 1988

JURISDICTIONAL DISPUTE COMPLAINTS

NOTE: This practice note adopts a revised procedure for dealing with jurisdictional dispute complaints and supersedes, for all purposes, Practice Note No. 15 issued on August 25, 1981.

1. The Board has adopted a pre-hearing conference procedure for jurisdictional disputes heard by the Board under section 91 of the *Labour Relations Act*. The Board will schedule a pre-hearing conference before a Vice-Chair and/or Board members. The purpose of this pre-hearing conference is to settle the dispute or, in the absence of settlement, to narrow the issues in dispute.

2. The parties are required to file complaints, replies or interventions in accordance with the Board's Rules and this Practice Note, and, in particular in accordance with Rule 60. Rule 60 states:

60. A complainant shall file together with his complaint, and every person served with a notice of application shall file together with his reply,

(a) any union constitution;

(b) any collective agreement;

(c) any agreement or understanding between trade unions as to their respective jurisdictions or work assignment;

(d) any agreement or understanding between a trade union and an employer as to work assignment;

(e) any decision of any tribunal respecting work assignment; and

(f) any other document,

relating to the work in dispute which may be in his possession and upon which he proposes to rely in support of his claim for relief or his claim that the relief requested should not be granted, as the case may be, and a statement as to any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

IN ADDITION, each party must, *at the same time*, file a brief which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the material facts upon which it intends to rely.

3. Prior to filing its complaint with the Board, the complainant must serve a copy of its complaint with the material referred to in paragraph 2, as well as a copy of this Practice Note, on each respondent and each person named by the complainant as someone who may be affected by the complaint.

4. The complainant must file its complaint and the material referred to in paragraph 2 in

quadruplicate with the Board. The complaint must be accompanied by a certificate of service as set out in paragraph 7 in respect of each respondent and each person named in the complaint as someone who may be affected by the complaint. When all the material has been served and filed, a date for the pre-hearing conference will be set by the Registrar. A COMPLAINT WILL NOT BE PROCESSED BY THE BOARD UNLESS THE COMPLAINANT HAS COMPLIED WITH THE REQUIREMENTS OF PARAGRAPHS 2, 3 AND 4.

5. Prior to filing its reply with the Board, a person served with the complaint must serve a copy of its reply and the material referred to in paragraph 2 on each of the other parties.

6. A reply and the material referred to in paragraph 2 must be filed in quadruplicate with the Board. The reply must be accompanied by a certificate of service as set out in paragraph 7 in respect of each other party. All respondents and others served with notice of the complaint must file their replies and other material referred to in paragraph 2 with the Board no later than twenty-one (21) days from the date service of the complaint was effected on them by the complainant. If the twenty-first day falls on a day on which the Board's offices are not open to the public, the reply with accompanying material must be filed no later than the next business day of the Board.

7. Duly completed certificates of service must be filed with the Board in the following form:

Certificate of Service

Board File No. _____

Re:

Complainant

and

Respondent(s)

I, (name) , on behalf of (name of party) hereby certify that I did serve (identify material)

on (name) , (position) , on behalf of (name of party being served) .

Service was effected (check one)

☐

in person

☐

by registered mail

☐

by ordinary mail

on the _____ day of _____, 19____

For the purpose of this certificate, service is defined as service in person or by registered or ordinary mail. The date to be indicated for service by mail (whether registered or ordinary) should be two days from the date of mailing.

8. EXCEPT WITH LEAVE OF THE BOARD, PARTIES WILL NOT BE PERMITTED TO ADDUCE EVIDENCE AT THE HEARING OF ANY MATERIAL FACT NOT DISCLOSED IN THE MATERIAL FILED WITH THE BOARD PURSUANT TO THIS PRACTICE NOTE.

9. If a hearing is to be scheduled following the pre-hearing conference, the Vice-Chair and/or the Board members conducting the conference shall forward to the Registrar for distribution to the parties, a memorandum of all agreements reached by the parties. The Vice-Chair and/or the Board members conducting the conference will not be members of the panel hearing the complaint on its merits.

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SANTOS, REINALDO; RE H.E.R.E., LOCAL 75; RE PEEL COUNTY FEED CO.
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Unfair Labour Practice - First Contract Arbitration - Employer proposing that bargaining unit members on strike be “notionally” recalled - Replacement teachers would continue teaching until the end of the school year - Employer’s conduct amounting to unfair labour practices - Settlement of a first collective agreement by arbitration directed

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Unfair Labour Practice - Settlement - Parties settling complaint pursuant to minutes of settlement - Parties seeking to have agreement issued as an order and to have the Board remain seized with respect to its implementation - Minutes not clear as to what order should be - Board not making any order nor remaining seized - Matter to be terminated in one year

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0288-88-FC; 0287-88-U Ontario Secondary School Teachers' Federation, Applicant/Complainant, v. Alma College, Respondent

First Contract Arbitration - Unfair Labour Practice - Employer proposing that bargaining unit members on strike be "notionally" recalled - Replacement teachers would continue teaching until the end of the school year - Employer's conduct amounting to unfair labour practices - Settlement of a first collective agreement by arbitration directed

BEFORE: *Rosalie S. Abella*, Chair, and Board Members *W. H. Wightman* and *N. Wilson*.

APPEARANCES: *Maurice Green*, *Fred Birket*, *Steven Prettie* and *Elizabeth Jackson* for the applicant/complainant; *D. K. Gray*, *G. F. Luborsky* and *D. F. Harris* for the respondent.

DECISION OF ROSALIE S. ABELLA, CHAIR AND BOARD MEMBER N. WILSON; July 8, 1988

1. These proceedings are brought pursuant to sections 40a, 15, 66 and 70 of the *Labour Relations Act*. The proceedings were consolidated on consent. The day after the hearing, on May 12, 1988, the Board issued a decision which read:

Re Board File 0288-88-FC and section 89 complaint File No. 0287-88-U between Ontario Secondary School Teachers' Federation and Alma College. This is to advise that the Board has endorsed the record in the following manner: "Before R S Abella Chair and Board members W H Wightman and N Wilson. Decision of the Board: By majority decision, the Board finds that Alma College has committed an unfair labour practice. The Board further finds that the requirements of section 40a of the *Labour Relations Act* have been established and therefore directs the settlement of a first collective agreement by arbitration. The persons to be reinstated forthwith by the respondent shall include Steve Prettie and Liz Jackson. A written decision will follow. Rosalie S. Abella for the Majority. Dated May 12th 1988".

The following are the reasons.

2. A differently constituted panel of the Board dismissed an earlier application by the union pursuant to sections 40a (2)(b) and (c) on December 23, 1987. Since that decision, five negotiating sessions took place in 1988 between the parties - on January 14, 27, February 4, 18 and March 1. The first of these meetings resulted in substantial progress, with the parties agreeing at its conclusion to use a mediator at subsequent sessions.

3. At the February 4 meeting, Fred Birket, the union's chief negotiator, told Alma College that the teachers felt they had gone "90% of the way" on the issues. On February 4, the union told the College that they had fixed February 15 for "sanctions". A strike did in fact take place on February 15. At the February 18 meeting, both parties felt some urgency, knowing that a prolonged strike would result in the loss of students. On February 28, Birket and a member of union officials met with the teachers and obtained their agreement to settle on Alma's terms.

4. By the end of the March 1 meeting, the union had agreed to all but two of the College's proposals: the first was Alma's contention that recall was strictly a management right and not subject to discussion with the union; the second and less significant to the union was the College's pro-

positional that only salaries, rather than all economic issues, were to be subject to arbitration during the second year of the agreement.

5. On April 20, Birket called and arranged a meeting for April 25 with Alma's chief negotiator, Steven Shamie, in Shamie's office. Birket was prepared to accept the College's terms but was told by Shamie at the outset of the meeting that there were some conditions of settlement and that "the biggest one may cause you to walk". This critical condition was the College's proposal that no one in the bargaining unit would actually be recalled. Five full-time and two part-time of the twelve teachers in the bargaining unit would be named and would be paid as of the ratification date, but replacement workers were to continue teaching until the end of the school year. When Shamie gave Birket the names of the teachers who were to be "notionally" recalled, Birket indicated that he not only had concerns about the legality of the proposal, but also that he could see no rationale behind the teachers who were named in terms of the students' needs - one was on pregnancy leave until June 15 and the other was an art teacher, most of whose students had left.

6. Two of the teachers with the highest union leadership profile, Steve Prettie, the main union organizer and a teacher at Alma for 15 years, and Liz Jackson, who was on the union's negotiating team from the outset of the contract negotiations, were not on the notional recall list. Two other teachers on the negotiating team were on the list, but did not have the same leadership role as Prettie or Jackson. Birket was concerned not only with their exclusion, but with the use of replacement teachers for the balance of the school year when the practice at the College had been to set examinations based on the whole year's work.

7. The school term ended on March 5 for a spring break until March 21. During this break, the College advertised for substitute teachers. It hired them on a per diem basis and subject to termination on 2 days' notice or 2 days' pay in lieu of notice. Seven full-time and two part-time substitute teachers were hired. Most of the substitute teachers did not have teaching certificates. Only the typing teacher and the physical education teacher of the twelve striking teachers did not have certificates. The Chairman of Alma's board, Donald Harris, gave evidence that by mid-April he felt it "unwise" and "disruptive" to introduce a "new" group of teachers to replace the substitutes who had been there for 3 weeks. He gave no further explanation or justification for his conclusion. It was his intention to keep the substitute teachers until the end of classes at the end of May and until the end of examinations and marking in the second week of June. Harris stated that the seven teachers he selected for notional recall were chosen on the basis of qualifications and seniority, discussions with the substitute teachers and the Acting Principal, but were not carefully picked because it was only a 'notional' recall and intended for the September classes. The substitute teachers used student note books to prepare their classes. In Harris' view, he knew the students could do better with their own teachers than with the substitutes who were unfamiliar with the school or its teaching methods, especially since there was a closer relationship between students and teachers in a boarding school like Alma than in a day school, but he felt he had a 'Hobson's Choice' to make. There was no one on the recall list who could teach Mathematics, as Prettie could, or Family Studies, as Jackson could, but it was Harris' intention to rely on volunteers from the community.

8. The College's other conditions of settlement included a ban on picketing as of the signing of the memorandum of settlement; Alma's ability to pay being subject to getting a line of credit from the Bank; retroactivity pay being available to everyone for the period from September to February 15 except for two weeks Alma felt had already been paid; the College's formula on pay being adopted; any settlement being subject to the return by the teachers of the College's books and chattels; and the dropping by both parties of all outstanding picketing charges. By the date of the hearing on May 11, all conditions proposed by the College had either been agreed to by the

union or dropped by the College, except the replacement worker issue. Birket reacted very strongly to this condition, told Shamie it was “the one thing I can’t get the team to move on”, and it was clearly the major obstacle to any settlement. On May 10, the day before this hearing, Alma offered to pay to the union in trust the amount it would have given to the five full-time and two part-time notionally recalled teachers, for the union to distribute as it saw fit.

9. It was clear that by March 1, the union had significantly reduced its demands and largely accepted the College’s proposals. An ongoing strike was in neither party’s interest, given Alma’s tenuous financial position and the real prospect that enrollment would suffer further from a prolonged strike. Nonetheless, at the meeting between Shamie and Birket on April 25, Alma stipulated seven conditions precedent to signing an agreement. Of these, one, the notional recall, can fairly be characterized not only as provocative to striking teachers, but as Shamie himself admitted, a ‘real problem’ which Alma anticipated could be destructive of the possibility of settlement. The notional recall list was designed without considering the actual teaching needs of the students. It was produced only one month after substitute teachers had started teaching, with almost 2 months of school remaining and 5 1/2 months completed by the striking teachers.

10. In the context of a boarding school where student-teacher relationships acquire a unique dimension, and where examinations were to take place in 6 weeks based on a whole year’s work, only 1 month of which the substitutes had taught, the proposal can only be seen as an attempt by Alma to obstruct the union, avoid bargaining in good faith, and to avoid the immediate return to work of teachers who had been leading or involved with the union. Although Alma’s evidence was that the decision was based on a desire to avoid disruption for the students, there was no explanation as to why it would be more disruptive to recall the striking teachers, many of whom had long-standing relationships with the students and some of whose students would in fact be graduating, than to retain substitute teachers who, at the time the decision to keep them was made, only had a 3 week relationship with the school and the students. It is difficult to arrive at any conclusion but that Alma was at least in part motivated by a desire to avoid signing a collective agreement, avoid negotiating the conclusion of the strike, and avoid the return to work of the union supporters. We therefore find that sections 15, 66, and 70 of the *Labour Relations Act* have been violated.

11. We are also satisfied that the concept, timing, and proposed implementation of the notional recall represents not only an uncompromising and not reasonably justified bargaining position, but also the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement, pursuant to section 40a of the Act. The “avoidance of disruption” justification is simply not, without any articulated basis or explanation as to why substitutes were less disruptive than the permanent teachers, objectively reasonable when placed in the context of the bargaining history of these parties or of the long-standing relationship between the striking teachers and the students. Proposed as they were during a critical and what was supposed to be a conclusive meeting, the seven conditions, and particularly the notional recall proposal, represent the attempt to avoid rather than expeditiously conclude a collective agreement. Shamie himself acknowledged at the outset of the April 25 meeting that he understood that these proposals, and particularly the recall one, would likely be intolerable to the union and an insurmountable impediment to the signing of a collective agreement. It is not a question of whether a notional recall as a concept offends the Act; it is a question of whether such a proposal, in circumstances such as these, is, as we have here found it is, deliberately and unreasonably obstructive both of good faith bargaining and of the possibility of concluding a collective agreement. We therefore direct the settlement of a first collective agreement by arbitration.

12. Because our direction pursuant to section 40a should eliminate the impediments to the

making of a collective agreement which a section 15 finding would otherwise require us to remedy, we order with respect to the violation of this section only that the respondent remove the notional recall proposal from its bargaining proposals. As to the violations of sections 66 and 70, we direct that the persons to be reinstated forthwith include Steven Prettie and Liz Jackson. We will remain seized in the event that there is any difficulty in implementing the Board's directions.

DECISION OF BOARD MEMBER W.H. WIGHTMAN; July 8, 1988

1. When the parties were given the majority decision in these matters on May 12, I respectfully dissented.

2. It is correct that at the April 25 meeting between Shamie and Birkett the College "stipulated seven conditions precedent to signing an agreement". However only three of the seven were discussed at length since the representatives of both parties assumed the remaining four would pose no impediment to settlement. By May 4 the College advised the union it had withdrawn one of the three remaining conditions, precedent, regarding salary calculations, and that it was prepared to submit a second, regarding retroactivity, to "rights" arbitration following execution of a collective agreement.

3. Thus as a panel of the Board we arrive at a common perception that the "notional" recall with full pay was the "real problem" before us, but was this to be taken as evidence of Alma having been motivated, even in part, by a desire to avoid a collective agreement, the conclusion of the strike and the return to work of the union supporters?

4. As reported in the majority decision, on May 10, the day before hearing, the College did indeed make a "with prejudice" offer to pay to the union in trust the amount it would have given to the five full-time and two part-time notionally recalled teachers, for the union to distribute as it saw fit. This offer was made to resolve a disagreement as to the identity, but significantly not the numbers of teachers who should be recalled. Moreover it should be stressed that the offer to pay the teachers in full and excuse them from any teaching duties for the balance of the current school year was an integral part of the "notional recall" proposal from the time it was first articulated by Shamie to Birkett at their April 25 meeting. I find it impossible to conclude that by effectively putting an employee on leave with full pay an employer can be seen to have violated the spirit or the letter of the *Labour Relations Act*.

5. Further evidence of the College being reconciled to the fact that it was now obliged to conclude and live with a collective agreement is to be found in the evidence as to the terms of employment for replacement teachers. The evidence before us is that it was made clear to these persons at their time of hiring that they might be terminated with two days notice and that in any event upon resumption of classes after the summer vacation they would be replaced by the "regular" teachers. I can only interpret such a forewarning as being indicative of an expectation on the part of the College that a collective agreement would be reached and the strike concluded if not during the current school term at least before the start of the next school year.

6. The proposal by the College that the method of calculating salaries be referred to rights arbitration following execution of a collective agreement is to my mind further indication that the College, through its unpaid Directors, was if not of an attitude to joyfully embrace collective bargaining at least resigned and resolved to live with the reality.

7. Moreover, I would adopt the argument that since a return to work protocol does not find its way into the terms of a collective agreement, the representatives of the parties had in fact

resolved all matters relevant to what would have been the written agreement once ratified and hence the applicant did not bring itself within the ambit of section 40(a).

8. Nor do I attach great weight to the fact that two of the teachers not proposed for notional recall were union organizers since two other persons known to be among the organizers were also among those whom the College did propose to notionally recall. In any event, as noted earlier, the May 10 offer to let the Union sort out who should be paid, while it might have involved an embarrassing decision for the union, was nonetheless a fair and practical solution for the College to have made.

9. Finally, I turn to the efforts of the majority to assess the relationship between the students and teachers, both regulars and replacements, since the majority, in part at least, appear to have been influenced by an apprehension that students would have been closer to their "regular" teachers.

10. For my part I would have accepted that those persons with overall responsibility for the operation of the College were best positioned and therefore entitled to have their explanation as to the reasons for their decision accepted.

11. For all of the above reasons I would have dismissed these applications.

1797-87-R International Union of Operating Engineers, Local 793 v. Bill Brownlee Excavating Limited, Respondent

Bargaining Unit - Certification - Construction Industry - Reconsideration - Board declining to reconsider its decision to include shop mechanics in a construction industry bargaining unit - Board also confirming its application of *Gilvesy*

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *W. Gibson* and *D. A. Patterson*.

DECISION OF HARRY FREEDMAN, VICE-CHAIR AND BOARD MEMBER W. GIBSON; July 21, 1988

1. Counsel for the applicant, by letter dated June 9, 1988, requests reconsideration of the Board's decision in this matter dated April 28, 1988 [[1988] OLRB Rep. April 364] wherein it directed a representation vote. Counsel for the applicant submits that the Board's finding that two equipment mechanics were employees in the bargaining unit on the application date was inconsistent with the Board's decisions in *J & M Chartrand Realty Limited*, [1978] OLRB Rep. May 423 and *590308 Ontario Inc.*, unreported, November 26, 1987. The Board in its decision of April 28, 1988 reviewed and considered both of those decision and for the reasons set out in its April 28, 1988 decision found "... that the mechanics who regularly perform both repair work at the construction site and in the shop are commonly associated in their work with on-site employees". Thus, the Board concluded that the two mechanics were employees in the bargaining unit on the application date.

2. That conclusion differed from the result in *590308 Ontario Inc.*, *supra*. The Board in that case, in finding that the three mechanics in question should not be included in the construction industry bargaining unit, relied on the fact that two of the three mechanics who were in dispute

worked on a construction site once a week and spent an overwhelming majority of their work hours in the shop. The Board also wrote, in respect of the third mechanic in dispute,

“... Although Mr. Holm goes into the field more frequently, and spends a greater proportion of his time away from the repair shop, he is nevertheless one of the respondent’s group of three mechanics who, in our view, would be more appropriately included in an industrial bargaining unit (along with their helper, whose name does not appear on the employer’s list) than in a unit with on-site construction employees.”

It is not clear from that decision whether the third mechanic, Mr. Holm, merely spent more time on a construction site than the other two mechanics, or spent a majority of his work time on a construction site. Also, the Board’s decision that it would be more appropriate to include that third mechanic with the two shop mechanics and to exclude all three mechanics from the construction bargaining unit is simply stated as a conclusion that the three mechanics “would be more appropriately included in an industrial bargaining unit ...” without referring to any factual basis for coming to that conclusion.

3. Counsel for the applicant also submitted that the Board erred in finding that the respondent operates a repair shop which employs only mechanics who are regularly and routinely dispatched to construction sites. Counsel submits that the Board was incorrect because other employees who report to and work out of that repair shop were excluded from the bargaining unit and cited the example of Lucien Beauregard. Those employees who were excluded from the bargaining unit for purposes of the count were *not* mechanics employed in the construction industry on the date of application. Mr. Beauregard, the example relied on by counsel for the applicant, was excluded from the bargaining unit because, on the application date he was operating a power sweeper and was not performing construction work.

4. Counsel also submitted that the Board’s decision was inconsistent with the principles set out in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 and *Delco Contractors*, [1987] OLRB Rep. June 830. Counsel submitted that although the Board purported to apply the principle that the date of application is the determinative date in deciding whether someone is an employee in the bargaining unit, the Board’s decision to include Ken Hart Sr. as an employee for purposes of the count is contrary to that principle as he was a mechanic who worked only in the shop on the application date.

5. The principle set out in *Gilvesy Enterprises Inc.*, *supra*, *E & E Seegmiller Limited*, *supra*, and *Delco Contractors*, *supra*, is used to determine whether an employee is included in the bargaining unit for purposes of the count. It is not used to define the description of the appropriate bargaining unit. In this case, the bargaining unit encompassed employees who are primarily engaged in the repair and maintenance of construction equipment on site and included off-site employees who are commonly associated in their work with on-site employees by applying section 117(b) of the Act. As the Board pointed out in paragraph 26 of its April 28, 1988 decision, employees who regularly work both in a shop and on-site are commonly associated in their work with on-site employees.

6. That determination of the bargaining unit description having been made, the Board applied the principles set out in *Gilvesy Enterprises Inc.*, *E & E Seegmiller Limited*, and *Delco Contractors*, to decide which employees were in the bargaining unit on the date of the making of the application. Since Mr. Hart Sr. was working as a mechanic who regularly did his work both in the shop and on-site, repairing and maintaining construction equipment on the date of the making of the application, he was included on the list of employees notwithstanding that on the application date, he did not actually work on-site.

7. In its April 28, 1988 decision the Board set out at paragraphs 32 and 33 the factual basis for concluding that it was appropriate to include the mechanics in the construction industry bargaining unit. We do not accept that our decision conflicts with the Board's decision in *590308 Ontario Inc.* which came to the opposite conclusion since no reference to the factual basis for that conclusion is contained in that decision. Also, the Board's decision of April 28, 1988 referred to and applied *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197, which was decided after *J & M Chartrand Realty Limited*, *supra*. Both *J & M Chartrand Realty Limited* and *590308 Ontario Inc.* made no reference to section 117(b) of the Act and *590308 Ontario Inc.*, *supra*, which relied on *J & M Chartrand Realty Inc.* also did not refer to *Esam Construction Limited*, *supra*, or the other decisions interpreting section 117(b) which were cited at paragraph 26 of the Board's April 28, 1988 decision.

8. Counsel for the applicant has not persuaded us that our April 28, 1988 decision was incorrect. For reasons set out above and for the reasons expressed in our April 28, 1988 decision, we are satisfied that our decision in this matter did not depart from the principles expressed in *Gilvesy Enterprises Inc.*, *E & E Seegmiller Limited*, and *Delco Contractors*. Additionally, we are satisfied that on the facts before us, the two mechanics in dispute were properly included in the bargaining unit for purposes of the count.

9. For the foregoing reasons, the application for reconsideration is hereby dismissed.

10. Counsel for the respondent filed written submissions responding to the applicant's request for reconsideration after the majority had written its reasons dismissing the application for reconsideration. The majority, in reaching its decision in this matter, did not consider the submissions filed by counsel for the respondent.

DECISION OF BOARD MEMBER D. A. PATTERSON; July 21, 1988

1. I dissent from the majority's decision to deny the reconsideration request filed by the applicant union, the International Union of Operating Engineers, Local 793.

2. I did agree with the Board decision on which the applicant is filing its request for reconsideration because I believe section 117's interpretation by the Board,

117. In this section and in sections 118 to 136,

...

- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;

...

would properly include Ken Hart Sr. an Athanasios Tsaussis in the unit applied for collective bargaining.

3. My reasons for granting a reconsideration by the applicant would be based on a number of factors which would allow a full airing of the reconsideration and possibly have a different effect on the outcome of the original decision of the Board.

4. The reconsideration should be granted because I believe both mechanics in question fall into a primary job classification of shop mechanics. The applicant over the years has developed a

customary craft bargaining unit for which it makes application. This unit description has been accepted in industry over the years as the acceptable normal bargaining unit for the applicant. Evidence during the hearing revealed that both mechanics are dispatched from the shop to the respective job sites and remain in the shop to maintain and do larger repair work.

5. The practical side of this reconsideration is what makes good industrial relations sense in this case. That, simply put, would mean we would recognize two distinct units, one for shop mechanics and secondly one unit for site mechanics. The preamble to the Act states clearly this is the purpose of the Act and to a large extent this is what has happened over the years. Both interest groups have enjoyed the arrangement over the years with very little disruption in the province.

6. If this tribunal is to inject into the labour relations community some sense of harmonious industrial relations which make sense to the respective parties who seek certification under the Act, then I believe the norm is the acceptable panacea to this application for reconsideration.

7. While the respondent may not be experienced in resolving bargaining unit descriptions the applicant did not attempt to change or alter its normal bargaining unit description. Failing this reconsideration the Board may open an entirely new approach to applications for certification in the construction industry.

8. Counsel for the applicant has cited various jurisprudence which speaks for itself. Unfortunately, the jurisprudence cited by the respondent is just as convincing. The Board policy was amended in 1987 from a representative period to the date of application in the construction industry. However, section 117(b) only lends itself to complicate that policy in determining what or who should be in the unit most appropriate for collective bargaining.

9. Finally, I would grant the reconsideration based on the jurisprudence, which has determined the same issue different in various cases. Having regard to that balance the Board should impose some practical labour relations logic.

2557-87-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local No. 582, Brantford, Applicant v. The Corporation of the City of Brantford, Respondent

Sale of a Business - Famous Players leasing theatre from city - Famous Players vacating theatre premises to show movies elsewhere - City taking possession and using theatre as a performing arts centre - No part of business sold to city - Application dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

APPEARANCES: *Stanley Simpson* and *J. Thomson* for the applicant; *Chris White* and *J. H. Flood* for the respondent.

DECISION OF THE BOARD; July 14, 1988

1. This is an application made under section 63 of the *Labour Relations Act*. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 582, Brantford ("Local 582") alleges and seeks a declaration to the effect that there has been a sale of a

business or part of a business by Famous Players Limited ("Famous Players") to the Corporation of the City of Brantford ("the City"). As a result of this alleged sale, Local 582 also seeks a declaration that the City is bound by the terms and conditions of a collective agreement between Local 582 and Famous Players which was operative at the relevant time.

2. The City called J. Dillon, J. Flood and P. Marcotte to give evidence. Local 582 called M. Thomson, the Union's Business Representative, to testify. In making its finding of fact, the Board has considered all of the oral and documentary evidence.

3. The Capitol Theatre ("Capitol") has played a prominent role in the entertainment scene in the City of Brantford. When the theatre opened in 1919 it was called the Temple Theatre and the name was changed to the Capitol in the early 1930's. Local 582 has held bargaining rights since the theatre opened for persons employed as stage hands and projectionists. For a considerable number of years, Famous Players has essentially utilized the Capitol for exhibiting motion pictures. On August 21, 1986, Famous Players ceased showing motion pictures at the Capitol and began to show motion pictures at triple cinemas at a new location called Eaton's Market Square owned by Campeau Corporation Limited. The City took possession of the Capitol when it was vacated by Famous Players and very shortly thereafter began to operate the Capitol as a performing arts centre. A representative of Local 582 approached City officials requesting the City to recognize Local 582's collective agreement. After considering the matter, the City representative advised the Local 582 representative that the City felt it had no legal obligation to recognize the collective agreement and would not do so.

4. As one might expect, the theatre was constructed for the purpose of providing live entertainment. It has a stage, a curtain, an orchestra pit, equipment necessary for props and lighting, and a considerable seating capacity. Vaudeville acts were a popular attraction in the 1920's, in addition to silent movies. Beginning in the 1930's until the time Famous Players vacated the premises, the Capitol was used primarily for the exhibition of motion pictures by Famous Players. Famous Players owned the land and the building known as the Capitol until approximately 1980. At that time, Famous Players sold the land and the building for business reasons to Famous Players Realty Investments Ltd. ("Realty"). Although the names are similar, Famous Players and Realty are not related companies. With the sale of the Capitol to Realty, Famous Players entered into a leasing arrangement with Realty. This leasing arrangement continued until November 1985 when Realty sold the Capitol to the City. Famous Players then leased the Capitol from the City on essentially the same terms as contained in the lease it had with Realty. The lease with the City did provide that Famous Players could terminate the lease when it moved to its new facility at the Eaton's Market Square.

5. When Famous Players ceased showing motion pictures at the Capitol on August 21, 1986 it terminated its lease with the City and on August 22, 1986, it began exhibiting films at the triple cinemas located at Eaton's Market Square. Famous Players entered into a leasing arrangement for the new facility with Campeau Corporation Limited. The employees of Famous Players who worked at the Capitol were transferred to the new facility where they experienced an increased workload given that the triple cinemas required more make-up and break-up time. The collective agreement between Local 582 and Famous Players covered the new facility including the stage clause contained therein. The triple cinemas did not have stages, although it is possible that events could take place at the cinemas which would require a stage person supplied by Local 582.

6. After Famous Players vacated the Capitol, the City closed the theatre until approximately October 1, 1986. During this period of time, the City carried out some basic renovations to the facility including painting, cleaning and the replacing of toilet fixtures. The movie screen was

removed and the City has not shown any films at the Capitol since it took possession. Beginning in October 1986, the City began to book the Capitol for plays, dramas, musicals, etc. It hired a theatre manager with the expertise to manage a performing arts centre. It also hired staff who are involved in various aspects of the Capitol's operation, including stage hands. Subsequent to October 1986, the City continued the process of renovating the Capitol. The orchestra pit, which had been covered over by Famous Players, was reopened and set up with a barrier, drapes, etc. at a cost of \$8,000.00, excluding labour. The plywood flooring of the stage was replaced with hardwood maple, which is more suitable for live productions (dance), at a cost of \$10,000.00. Most of the ropes were replaced and pipes were added for hanging lighting and scenery. The mechanical and electrical systems were upgraded at a cost of \$500,000.00. Other renovations costing over \$1,000,000 will soon be underway. Included in these renovations will be the removal of a cafe, the expansion of the lobby and the creation of a bar area. The City obtained a liquor licence and serves liquor from what used to be a snack bar. The City does not serve food at the Capitol.

7. While operating out of the Capitol, Famous Players did provide some live entertainment to the public. The Brantford Symphony Orchestra, the Brantford Memorial Concert Band, the Brantford Youth Orchestra, the Actors Trunk Company and others, would contract occasionally with Famous Players for the use of the facility and for the necessary labour. Famous Players did not solicit stage shows but did allow some at the Capitol in order to maintain good community relations. Since it had the potential of interfering with its contractual obligations with its distributors, Famous Players discouraged the use of the Capitol for live performances. While in the control of Famous Players, the Capitol was used less than half of one per cent of the time throughout the course of a year for purposes other than the showing of movies. When Famous Players did have a live show at the Capitol, it would obtain the necessary stage hand(s) from Local 582. Local 582 is a mixed local with both projectionists and stage hands as members.

8. In early 1987, the City had a musical show at the Capitol called Twentieth Century. Since this was a union show, the City requested Local 582 to supply it with unionized personnel. Local 582 supplied 13 members from its Local as well as 16 others from sister locals. Local 582 then made an application for certification in which it sought a bargaining unit of all stage employees employed by the City. For reasons not here relevant, Local 582 sought leave of the Board to withdraw its certification application "without prejudice to its right to proceed under section 63 of the Act". The Board (differently constituted) dismissed the certification application, and noted that the determination of whether the making of that application or its dismissal will prejudice a section 63 application is a matter for the panel which hears the section 63 application.

9. The relevant parts of section 63 are as follows:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

10. The following paragraphs in *More Groceteria Limited*, [1980] OLRB Rep. April 486 describe the scope and purpose of section 63 as follows:

15. Section 55 [now 63] of the *Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried simultaneously....

16. Unfortunately, however, the latter function of the section - providing some permanence to collective bargaining rights - is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis of this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55 [now 63]. See *John Wiley & Sons Inc. v. Livingston* (1964) 376 U.S. 543, 84 S. Ct. 909; *Goldberg, The Labor Law Obligations of a Successor Employer* (1969), 63 N.W.L. Rev. 735; Note, (1966) 66 Col. L. Rev. 967; Note, (1969), 82 Harv. L. Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not "ordinary contracts" nor are they in any real sense the simple products of consensual relationships. See *McGavin v. Toastmaster Ltd. v. Ainscough et al* [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55 [now 63].

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term "sells" is defined to include "leases, transfers, and any other manner of disposition". This all-embracing definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term 'business', on the other hand, is simply defined to include 'a part or parts thereof.' No similar exhaustive definition, was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy....".

11. The Board examined the meaning of the words "part of a business" in *Beef Terminal (1979) Limited*, [1980] OLRB Rep. Aug. 1167 beginning at paragraph 20:

20. Most of the cases under section 55 [now 63] involve an alleged sale of "a business". The Board has found a sale of a part of a business where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1970] OLRB Rep. April 118; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244) and where there was a transfer of the oil burner installation and service branch, of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1971] OLRB Rep. May 515). In *British Columbia Provincial Council, United Fishermen and Allied Workers Union and Central Native Fishermen's Co-operative et al.*, [1977] 1 Can LRBR 329, the British Columbia Labour Relations Board found that there had been a sale of a "part of a business" when a cannery which was part of a larger business organization was sold to a fishermen's co-operative. The Board declined to cancel the union's certification because it found that, notwithstanding the fact that the workers shared in the profits of the operation, they nevertheless carried out their day-to-day work functions in essentially the same manner and under similar direction as they had done when the operation was owned and run by the predecessor company.

21. In *Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508 and in *Alcan Building Products*

Limited, [1968] OLRB Rep. May 212, the Board dealt with business situations which have a number of similarities to the one presently before us. In *Canac* the predecessor was engaged in the manufacture of a variety of product lines, most of which were related to the automobile industry. Its operations were divided into a number of departments. One of these was the shock absorber department, which employed approximately 20 per cent of the predecessor's total production personnel. The predecessor's corporate parent decided to liquidate the predecessor's business, and the shock absorber portion of that business was transferred to Canac which, *inter alia*, leased machinery, equipment, tools, and that portion of the premises used by the predecessor (Acme Screw and Gear) to produce shock absorbers. The resulting situation was described by the Board as follows (at paragraph 22):

"Canac is presently engaged in the production of shock absorbers, and to that extent is carrying on part of the business formerly operated by Acme. The operation takes place in the same area of the plant as was used by Acme in the production of shock absorbers. The superintendent of the Acme shock absorbers department, and 11 or so other supervisory staff of that company, occupy similar posts in the new company. Canac is, in effect, the shock absorber department of Acme Incorporated, but otherwise continuing in much the same manner before incorporation."

In *Canac*, the Board found a sale of part of the predecessor's business and held that the union's bargaining rights were preserved. In *Alcan Building Products Limited*, a corporate entity was engaged in the production of aluminum products and carried on business through separate divisions, each of which had its own employee complement and produced a variety of product lines. For economic reasons, a decision was made to discontinue one of these divisions. The successor acquired the premises and some of the equipment used by the predecessor (the rest being disposed of to unrelated purchasers), retained a few of the former employees, and continued to produce two products which had accounted for only a small proportion of the predecessor's total production. The Board nevertheless found a sale of "part of the predecessor's business".

22. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, "knowhow" or goodwill, - thereby allowing the successor to perform the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. In all of these cases there was a transfer of a distinct part of the predecessor's configuration of assets and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of the employee complement; and, but for section 55 [now 63] the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 [now 63] is directed, and the Board was satisfied on the evidence in each case that it should be applied.

12. On behalf of the respondent, it was argued that there has not been a sale between Famous Players and the City since there has not been a disposition of anything between these two employers. It was submitted that the only disposition occurred when Realty sold the Capitol to the City but that this transaction only involved the transfer of an asset. In support of its position that a sale had taken place, Local 582 referred to the broad definition of sale contained in the Act. Counsel argued that a disposition occurred when the lease between Famous Players terminated and the City obtained possession of the Capitol. It is unnecessary for us to decide whether the facts support a finding of a sale since, in any event, the Board is satisfied that there has not been a "sale" of a "business" from Famous Players to the City within the meaning of section 63 of the Act.

13. In attempting to persuade us that Famous Players transferred its business to the City, Local 582 focused on the nature of the asset (the Capitol) the City obtained possession of when Famous Players terminated its lease. The Capitol was clearly built for the purpose of providing live

entertainment. In addition to the nature of the asset which was transferred, counsel submitted that the business of Famous Players is providing entertainment. The nature of the entertainment it provided has changed over the years and may change in the future. Counsel argued that the City is also in the business of providing entertainment at the Capitol. Alternatively, counsel argued that Famous Players sold that part of its business relating to live entertainment to the City.

14. The Board does not agree with the overly-broad proposition that Famous Players sold its entertainment business to the City. We agree with the submission of the respondent that Famous Players is in the business of exhibiting motion pictures. Up until August of 1986, it carried on this business in a facility designed to provide live entertainment and, occasionally, Famous Players did permit the Capitol to be used to provide such entertainment. However, the business of exhibiting motion pictures was not transferred to the City by Famous Players. It is clear from the evidence that the City has not and does not intend to show films at the Capitol. The nature of the business now operated at the Capitol by the City is considerably different from the business of Famous Players as evidenced by the nature of the performances, the presence of a theatre manager, and the extensive renovations to the Capitol. Nor do we agree that Famous Players transferred part of its business to the City, having regard to the particular circumstances and the comments of the Board in *Beef Terminal*, *supra*, quoted above. The number of live performances while the Capitol was used by Famous Players was minimal. These are not the circumstances in which one can conclude that Famous Players transferred a “coherent and severable part of its economic organization” to the City.

15. The circumstances before us disclose that Famous Players sold neither its business nor part of its business to the City but rather simply moved its business of exhibiting motion pictures from the Capitol to a new facility in Brantford. The employees of Famous Players were transferred to the new facility and Local 582’s collective agreement with Famous Players including the stage clause provision covers the new location. Thus, the mischief to which section 63 is directed is not present in the circumstances of this case.

16. Having regard to the foregoing, the Board finds that there has not been a sale of a business or part of a business from Famous Players to the City. Accordingly, this application is dismissed.

3025-87-U Brantford Typographical Union, Local 378 Communications Workers of America, Complainant v. Brantford Expositor, A Division of Southam Inc., Respondent

Bargaining Unit - Duty to Bargain in Good Faith - Unfair Labour Practice - Employer bargaining to impasse assignment of composing room work to other locations at the newspaper - Composing room bargaining unit would disappear - Whether employer’s proposal an attempt to restructure the bargaining unit or a jurisdictional or work assignment dispute - Dispute held to be a recognition issue - Breach of good faith bargaining duty

APPEARANCES: Nelson Roland, Allison Hudgins, Richard Rosenblatt, and David Esposti for the complainant; Colin Morley and J. R. Ferris for the respondent.

BEFORE: K. G. O’Neil, Vice-Chair, and Board Members J. Trim and E. G. Theobald.

DECISION OF THE BOARD; July 13, 1988

1. The respondent employer is a daily newspaper in Brantford, Ontario. The applicant union, sometimes referred to in this decision as the BTU or the typographical union, represents the employees in the composing room and is a Local of the Communications Workers of America (CWA). Both parties describe their 80 year bargaining relationship as a stable one. The dispute between them concerns the employer's position that it requires flexibility in assignment of composing room work in order to compete in an era of technological change. It has offered the union incentives to agree to this but the union has not agreed. Rather, the union maintains that to do so would be to agree to the disappearance of the bargaining unit. Its complaint alleges bargaining in bad faith and related violations of section 3, 15, 64 and 91 of the *Labour Relations Act*. The union says it is illegal to bargain the description of the bargaining unit to impasse. In the alternative, the union submits that the matter should be dealt with as a jurisdictional issue under section 91, rather than be made the subject of a strike or lockout. Management maintains that the matter is an issue of work assignment and necessary relief from restrictive work practices. No collective agreement had been concluded at the time of the hearing.

2. The facts are not in substantial dispute. The Board made the following findings of facts after hearing evidence from David Esposti, staff representative for the union and J. R. Ferris, the employer's business manager, the respective spokesmen for the parties during the recent round of negotiations.

3. Composing room work is a stage in the production of a newspaper, which occurs between the editing of stories and other material and the process of printing them. With the technology currently in use, composing room work deals with creating a final setup of a newspaper page that can be filmed and sent to a camera for photographing and eventual printing as the newspaper page. The source of the problem between the parties is that technological change, computerization in particular, has blurred the lines between traditional composing room work and that of other departments of the newspaper. It is the Expositor's position that because new technology has the capacity to do composing room work in other locations, there are certain aspects in the current setup that require work to be done twice, such as the input of editorial codes for headlines and typing of advertising copy and letters to the editor. The company acknowledges that not all the work done in the composing room is a duplication. The union acknowledges that at least for some types of pages in the Newspaper the work could go directly from the newsroom to the pressmen represented by another union. The union was also concerned about the fact that under the company proposal even the non-duplicated work could be transferred out even if there was no change in technology.

4. The present method in use at the Expositor is known as cold type. The predecessor technology, hot metal, required everything in the paper to be cast in lead slugs. In the cold type system, film has taken the place of the lead. The printer does the same thing with paper and film that was earlier done with pieces of lead type. The plate that actually does the printing is now made by photographic process. The cold type system is lighter and less cumbersome work. Computerization, referred to as the third era of technology in composing room work, would replace the film and paper currently used with electronics. The computerized system, known as pagination, makes it possible to format a newspaper page on the computer screen at the same time as the content is input into the computer. This has the potential to make composing room work obsolete. Although there are some things currently done by electronics at the Expositor, it basically operates as a cold type printer. A "side letter" was appended to the expired collective agreement preventing the employer from introducing pagination during its term.

5. The prior collective agreement expired on November 30, 1987. In May, 1987, the employer approached the union about the possibility of having early talks on the issue of unit jurisdiction relating to the composing room to facilitate formal bargaining in the fall. The parties met on May 28, 1987 to discuss this possibility. The union then held a membership meeting and obtained authorization to pursue the issue of work jurisdiction to see what the company wanted and was prepared to offer in exchange. As a result, the parties met informally twice in July to discuss the issue. The pattern of bargaining between the parties has included bargaining with a council of unions, made up of the Southern Ontario Newspaper Guild (the Guild), the Graphic Communications International Union (GCIU), and the BTU; representatives from the members of the joint council other than the BTU attended as observers. The company stated that the question of the BTU's jurisdiction over composing room work had been a hurdle which had held up previous sets of negotiations with the joint council and it wanted to avoid this happening in the November negotiations. The company made it clear that, although it had backed off in previous years on this issue, it was not prepared to do so again. The company wanted to explore whether or not the union was interested in "a deal on jurisdiction - whether or not it was for sale". The employer sought the right to transfer work presently in the composing room to any other area of the newspaper or outside the newspaper if and when it chose. As a result of its membership meeting on the issue, the union had drawn up a list of items that would have to be addressed by the employer in a meaningful way before it would be willing to "sell" its jurisdiction. The employer offered life-time job guarantees to the individuals currently in the composing room but did not agree to the conditions listed by the union. The issue remained unsettled at the end of the July meetings.

6. Formal negotiations commenced on November 18, 1987 with an exchange of proposals. The three individual unions gave their proposals with the Joint Council issues incorporated into them. The BTU proposed no changes in jurisdiction, but asked for all side letters to be renewed, including the ban on introduction of pagination. The company tabled language to allow total flexibility in composing room work assignment.

7. There are several lengthy provisions in the expired collective agreement which relate to work jurisdiction. The original language pre-dates Ontario's collective bargaining legislation and modifications have been made by agreement to deal with technological change in the interim. The centrally relevant portions are as follows:

JURISDICTION

Section 1. The Employer agrees to employ only members of the Union to perform all work within the jurisdiction of the Union.

Section 2. Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as:

[16 lines of named classifications and description of composing room work processes]

The employer shall make no other contract covering work done above mentioned, especially no contract using the word "stripping", to do any of the work involved in producing the completed product as it appears in the plate made therefrom.

The employer's proposal on jurisdiction, modelled after an agreement between the Ottawa Citizen, also a Southam newspaper, and another Communications Workers' of America Local, was as follows:

Section 1 - Jurisdiction

- a) - The employer agrees to employ only members of the union to perform all work within the jurisdiction of the union.
- b) - Effective December 1st, 1987, the company shall have the right to transfer any work, equipment and/or process, in whole or in part, from the jurisdiction of the composing room bargaining unit as described in any or all previous collective agreements.
- c) - The company shall be free from all jurisdictional claims as contained in sections 2, 3, 5, 5A, 5B and all other references to jurisdiction in the 1985-87 collective agreement.
- d) - The Publisher shall have the right to assign, reassign, or transfer any of the work required by existing or new technology, equipment or processes to any department of the newspaper, including departments not covered by this agreement.

The other proposals made by the company included a lifetime guarantee of employment to the current members of the bargaining unit, individually listed as an Appendix, together with an early retirement incentive plan, language dealing with transfer of employees (later withdrawn) and language concerning successor employers and unions.

8. At the end of the November 18th meeting, further meeting dates of November 24th and 25th were set, the 24th to be devoted to explanation of individual positions and the 25th to be devoted to negotiations. Mr. Ferris indicated that he wanted the BTU to go first on the 24th and that jurisdiction would be the first and foremost issue on the company's agenda. At the meeting of the 24th, when the company presented its proposal on jurisdiction, the union asked questions as to its effect on employees, including how much work they would have, what it would be and for how long. The fundamental question was if and when the employer removed all the work from the composing room, what would become of the bargaining unit itself. Mr. Esposti recalls phrasing the question as: "Is it not likely or feasible if the employer removed all the bargaining unit work that the bargaining unit would cease to exist"? Management agreed it was. The employer explained that it did not anticipate this happening immediately but gradually, by attrition lasting until the turn of the century. On the 25th, Mr. Esposti indicated he was willing to go on to other issues, such as transfer, job security and wages. The employer would not discuss other issues until the parties came to terms on jurisdiction. By the afternoon of the 25th, the parties had reached an impasse. The employer applied for conciliation for all three unions. Although the employer was willing to continue talks with the Guild and the GCIU, neither was willing to go along without the BTU.

9. There was one conciliation meeting in mid-December. There was no progress regarding the BTU's jurisdiction and the employer did not withdraw its proposal. A second conciliation meeting on January 18, 1988 failed to resolve the issue as well. The employer continued its position that it was not prepared to discuss anything separate from the jurisdiction issue. It indicated to the union that a resolution of all the other issues would not lead to an agreement without settlement of the work jurisdiction issue. Mr. Esposti had serious concerns about the propriety of the employer's work jurisdiction proposal and told Mr. Ferris he did not feel obligated to negotiate that proposal. Mr. Esposti explained that article 2 of the expired collective agreement provides that jurisdiction and recognition, the appropriate bargaining unit, are one and the same. The protection of the individuals offered by the company did not alleviate the union's concerns because once the individuals were gone there would be no BTU bargaining unit at the Brantford Expositor. After the January 18th meeting, a no board report issued for each of the three unions in the Joint Council.

10. Two mediation meetings followed in February. At the first of these, on February 8th, the employer's position on work assignment or jurisdiction remained the same. The employer withdrew its proposal on transfer and presented a statement of principle to the union, which was

meant to communicate that BTU members would not be laid off, that the decline in composing room work would be dealt with by attrition and that any remaining employees would be given meaningful work. In light of a February 11, 1988 strike deadline Mr. Esposti told the company the BTU was seriously considering going to the Board over the employer's jurisdiction proposal. Since the company's position remained the same by the end of the meeting the union filed this complaint, dated February 8th. The parties entered into an agreement to maintain the status quo and not strike or lock out, pending resolution of the issue, a Board decision, or impasse on some other issue. There has been no strike or lockout since that agreement. This agreement amounts to a joint statement that impasse had been reached on the work jurisdiction issue.

11. At the second mediation meeting on February 25, 1988 the employer did not withdraw its jurisdiction proposal. There was some discussion at this meeting; the BTU attempted to get the employer to talk about its particular monetary issues, since the other unions were making progress on their own monetary issues. The employer responded that it did not wish to discuss the other issues, that jurisdiction was "one big wall of wax" with the others.

12. Traditionally the Joint Council had bargained "joint" money together. The BTU asked the employer whether, if the Board ruled in favour of the BTU on this complaint, the employer would have the same position for the BTU as the other two unions in joint monetary negotiations. The employer's response was that if it lost at the Board it would have to come at the monetary package in another manner since it saw the jurisdiction issue as a monetary one. Mr. Esposti suggested to the employer that it drop its proposal on jurisdiction and make a wage proposal as if it had lost at the Board. The employer declined to do so.

13. There are no similar jurisdictional issues with the other unions that bargain in the joint council. Newspapers such as the Montreal Gazette, the Windsor Star and the Ottawa Citizen have recently agreed with unions on provisions giving relief to employers on the subject matter of jurisdiction. These unions include other Locals of the CWA. A tentative agreement along similar lines was also recently reached in Halifax.

14. In negotiations with the other members of the joint council, the company did not insist that all other issues be resolved before economic issues were discussed. The company did not tie anything to a single major issue, because there was no single major issue to tie it to with the other unions. None of the other collective agreements with which Mr. Ferris deals has a bargaining unit defined by the work done. Therefore, there was not the same pressure to bring substantive proposals to remove the jurisdictional language. Ferris explains the refusal to bargain anything "economic" with the BTU without the jurisdiction issue on the basis that it was impossible to know what position the employer would be in until it knew the outcome on the jurisdiction issue.

15. The Board's jurisprudence makes it clear that neither party to a collective agreement may press to impasse the definition of the bargaining unit, the extension of bargaining rights or other matters of recognition, because the concept of the definition of the bargaining unit and the recognition of its representative is fundamental to the scheme of the Act. This general theme has been sounded in a variety of fact situations, e.g. a trade union attempt to force the extension of its bargaining rights, *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776, an employer's attempt to solve an anticipated jurisdictional dispute by way of bargaining, *Toronto Star*, [1979] OLRB Rep. Aug. 811 (the Burkett panel), a union's efforts to extend its rights beyond the provincial limits determined by the constitution, *Burns Meats*, [1984] OLRB Rep. Aug. 1049, and an attempt by an employer to modify the recognition clause to avoid a related employer declaration, *Cybermedix Limited*, [1981] OLRB Rep. Jan. 13. However, it is clear that the parties are entitled to raise and discuss these matters, as took place in the *Journal Publishing*

Company of Ottawa Limited, [1977] OLRB Rep. June 309 and in the earlier *Toronto Star* case, *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451 (the Carter panel). The Board's approach in the context of an employer proposal to delete casual nurses from the bargaining unit in the *Wellington Dufferin Guelph Health Unit* case, [1979] OLRB Rep. Nov. 1115 was as follows:

The bargaining unit issue poses more difficulty involving, as it does, the allegation that the respondent has sought to force the union to give up its statutory right to represent certain employees in the unit. This issue was discussed in *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776 where the Board found that a trade union could not strike to force the inclusion of employees in a bargaining unit. Although the Union and Employer could voluntarily agree to their inclusion, the board found that this issue could "not be pressed to an impasse", i.e., made the subject of a strike. Similar reasoning (and language) was employed by the Board in *Toronto Star*, [1979] OLRB Rep. Aug. 811, where the Board characterized the employer's conduct as an attempt to circumvent the jurisdictional dispute provisions of the Act. It is contended that the present case is the reverse of the situation in the *Carpenters* case, *supra*, but we need not comment on that case because we are not persuaded that the bargaining unit issue was "pressed to an impasse." No strike or lock-out was imminent nor are we satisfied that this issue was the real stumbling block to an agreement or that "but for" the employer's insistence on this issue there would have been an agreement. The union was entitled to refuse to discuss the matter and require the employer to move on, but we are not convinced that the union did take this unequivocal position. One might wonder why, after so many years, the employer raised the matter, and left it "on the table" in face of the obvious opposition on the union; however, as at the date of the hearing, it was no longer "on the table" and we need not consider it further. Had we been satisfied that the employer was adamantly insisting on restructuring the unit or was directly, or indirectly, making either an agreement or a major concession conditional on the union's acceptance of its position in this matter, we would have found a breach of section 14.

16. It has been emphasized in the various cases that the bargaining unit is the critical starting point of collective bargaining and the manner by which one defines the parties to the bargaining relationship. A clearly defined bargaining unit is also necessary to know the grouping of the employer's employees in respect of which there is a duty under section 15 to bargain in good faith and make every reasonable effort to make a collective agreement. The general rule is that the parties are not allowed to insist upon demands which give rise to an illegality or to press to impasse a demand inconsistent with the scheme of the Act, which includes demands to restructure the bargaining unit.

17. For the American experience in this area, which was referred to in argument by both counsel, see (among others) *York Dispatch*, NLRB Case 4-CA-15797 (1988) (not reported in Board volumes); *Newspaper Printing Corporation v. NLRB*, 104 LRRM 2433 (referred to by the parties as NPC Tulsa); *Standard Register Company*, NLRB Case 9-CA-24286 (1987) (not reported in Board volumes); *NLRB v. Columbia Tribune Publishing Company*, 86 LRRM 2079, U.S. Court of Appeals, 8th Circuit (St. Louis).

18. The question to be decided is whether the employer's proposal was an attempt to restructure the bargaining unit, whether directly or indirectly. If so, it is a violation of the duty to bargain in good faith. If not, it is either a jurisdictional dispute and should be dealt with under section 91, or a perfectly legal proposal over work assignment, which may be tested by means of economic sanctions. What complicates the matter here is that the jurisdiction of the union and the bargaining unit are defined in identical language, a common feature in collective agreements dealing with trades and crafts. As pointed out by the Carter panel in *Toronto Star*, [1979] OLRB Rep. May 451, however, bargaining rights and work jurisdiction cannot be equated exactly. In that case the Board characterized a dispute over an employer proposal to gain sole discretion over "the assignment of jurisdiction over new equipment and/or new processes" as a latent jurisdictional dispute. It dismissed the complaints of bargaining in bad faith and other unfair labour practices made by one

union against the employer and a second union, but cautioned the parties that any attempt to circumvent the jurisdictional dispute sections would be bargaining in bad faith. The relevant collective agreement contained separate recognition and work jurisdiction clauses, which is not the case on the facts before us.

19. As the new panel (the Burkett panel) in the subsequent *Toronto Star* case, [1979] OLRB Rep. Aug. 811 pointed out, at paragraph 15, there will at least be some effect on the representation rights when the work assignment among craft units is changed:

15. A union holding the bargaining rights for a craft unit of employees, as distinguished from an all employee unit, represents only the employees working within that craft. Regardless of whether the work of the craft is expressly set out in the collective agreement, the bargaining rights of the union representing a craft unit of employees are circumscribed by its established work jurisdiction. Consequently, any alteration in work assignment affects the scope of its representation rights. It follows that the Board is given the authority under section 81 [now section 91], the section of the Act dealing with work jurisdiction disputes, to alter the bargaining unit determined in a Board certificate or defined in a collective agreement as it considers proper for there is an inherent recognition element to many work jurisdiction disputes. This is not to say, however, that there is an equation between work jurisdiction and recognition even where members of one union lose their jobs as a result of a change in a work assignment. If the matter involves an assignment of work between competing unions and not an attempt to deal with other than the bargaining agent recognized for the employees in the craft unit, then it is essentially a work jurisdiction dispute and must be treated as such.

The Board further observed that the employer cannot unilaterally wipe out the existence of a craft unit by reassigning the work of the craft, nor can a competing union effect that result by requiring the work to be reassigned. Rather, section 91 is designed to determine which union will, in the end, do what work. The Burkett panel continued the Carter panel's characterization of the dispute as essentially over work assignment rather than recognition, held that the parties had done precisely what the Carter panel had warned against, and found a violation of the duty to bargain in good faith in the pressing of the work assignment issue to impasse. Our case is different from the *Toronto Star* cases in at least two respects, first, at the moment the dispute is bilateral and does not involve any union in competition with the BTU or an actual disputed work assignment; and, secondly but more importantly, the recognition and work jurisdiction language are equated by the parties' own drafting.

20. The long term, acknowledged, effect of the employer's proposal is not only an altered work assignment, but the dissolution of the bargaining unit. This effect is softened by the fact that it is proposed to be done over time, with no adverse effect to any current employee in the bargaining unit, and by its motivation in the understandable and proper drive to deal with inevitable technological change. However, the fact that the effect is not as stark as in a case where one party demands the immediate contraction or expansion of bargaining rights, makes it no less effective to the same end. The BTU is being asked to agree to language which, not today, but at any time the employer named, would allow not only the restructuring of the bargaining unit, but its abolition. It is also being asked to agree that in future it would be unable to assert its bargaining rights. In fact, there would be no recognition rights remaining if the employer made full use of the potential force of its proposed language which would allow it to permanently transfer all composing room work out of "the jurisdiction of the composing room bargaining unit". In these circumstances, the dispute is properly seen as a recognition issue which may not be pressed to impasse under section 15 of the Act. This is no less so because it is also potentially a jurisdictional dispute which, if it crystallizes in the future, could be dealt with on its merits under section 91. That is the proper forum to deal with the employer's argument that it is being required to assign redundant work under the current setup of BTU work jurisdiction.

21. Given the above findings, it is unnecessary to deal with the union's alternative argument regarding section 91, or the pleaded, but not argued, violations of section 3 and 64.

22. The Board, therefore, declares that the employer, by pressing its proposal over work jurisdiction to impasse, has acted in a manner inconsistent with the scheme of the Act and has thereby failed to meet the obligation contained in section 15 of the Act. The employer is directed to cease insisting on its proposal on work jurisdiction and to meet with the union within thirty days to bargain in good faith and make every reasonable effort to effect a collective agreement.

3156-87-U; 3367-87-U Canadian Textile & Chemical Union, Complainant v. Brown Manufacturing Ltd., Respondent

Settlement - Unfair Labour Practice - Parties settling complaint pursuant to minutes of settlement - Parties seeking to have agreement issued as an order and to have the Board remain seized with respect to its implementation - Minutes not clear as to what order should be - Board not making any order nor remaining seized - Matter to be terminated in one year

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

DECISION OF THE BOARD; July 5, 1988, as amended July 21, 1988

1. The Board granted an adjournment in this matter for reasons given in its decision dated June 6, 1988, and directed that it be put down for hearing on July 18 and 19, 1988. Prior to those dates, the parties settled the matter pursuant to Minutes of Settlement ("the Settlement") dated June 17, 1988 which read as follows:

The parties agree to resolve the complaints as follows:

1. The Respondent agrees to reinstate DAVIN LEE to his position in the Quality Control Department, effective June 6, 1988. The Respondent further agrees to pay DAVIN LEE no less than \$7.45 an hour and to ensure that all terms and conditions of employment enjoyed by DAVIN LEE as at March 7, 1988, are reinstated.
2. The Respondent agrees that in the event that lay-offs should become necessary in the Quality Control Department, DAVIN LEE will be the last employee laid off, and the first employee recalled from layoff. No employee shall be transferred or hired to work in the Quality Control Department until laid-off Quality Control employees have been given the opportunity of recall.
3. The Respondent agrees that ROBERT FRIGAULT is a laid-off employee with recall rights in the Quality Control Department and shall have recall rights for a period of 12 months from the date of this Agreement.
4. The Respondent agrees to provide the Complainant with reasonable access to bulletin boards where notices to employees are regularly posted. The Respondent will take reasonable steps to ensure that union notices posted on the bulletin boards are not altered, defaced or covered up by any other material. The Respondent will give a representative of the Complainant reasonable physical access to its premises so that it can satisfy itself that the Respondent's undertaking in this paragraph 4 is being complied with.
5. The Respondent will permit at least two representatives of the Complainant to hold a

meeting on the Respondent's premises with all employees, during normal working hours and without loss of pay. Such meeting shall be no longer than one (1) hour in duration and shall be on a date established by mutual agreement but not later than Friday, July 29, 1988. The meeting will be conducted outside the presence of any member of management.

6. The parties agree to seek leave to have this agreement issued as an Order of the Board and to have the Board remain seized with respect to its implementation.

2. In paragraph 6 of the Settlement, the parties request the Board to issue the agreement as an "Order of the Board" and to remain seized with respect to implementation. That wording does not make it clear what single "order", the specific word used in the Settlement, the parties desire the Board to make. The Board has indicated that it will not issue orders or declarations unless the parties have agreed to the issuance of (a) *specific* order(s) or declaration(s) and the Board has the jurisdiction to issue the order(s) or declaration(s) so requested: *Elmont Construction Limited*, [1987] OLRB Rep. Feb. 209 and *Consolidated Aluminium (Maritimes) Ltd.*, [1987] OLRB Rep. Mar. 350. We note that subsection 89(4) states that "where the Board is satisfied that an employer ... has acted contrary to [the Labour Relations] Act ["the Act"] it may issue a remedy for such contravention. The Settlement neither states which "Order" the parties have agreed to request the Board to make nor the basis for issuing such "Order". Quite simply, we do not know what order to issue, even if we were satisfied we should issue any order.

3. In this regard, and in regard to the parties' request that the Board remain seized of the implementation of the Settlement, we refer the parties to subsection 89(7) of the Act which reads as follows:

Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

Therefore, it is not necessary for the Board to remain seized and we do not do so. The appropriate way to enforce the Settlement is pursuant to subsection 89(7).

4. No doubt because of the request that the Board remain seized, the parties have not indicated whether these complaints are to be withdrawn or terminated. Neither withdrawal nor termination would preclude either party's bringing a complaint pursuant to subsection 89(7) of the Act. Under the circumstances, unless otherwise requested by the parties, these complaints shall be terminated one year from the date hereof.

3241-87-G The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, Applicant v. **Calorific Construction Limited**, Respondent v. Mechanical Contractors Association of Hamilton, Intervener

Construction Industry - Construction Industry Grievance - Union contending that its members entitled to travel allowance when they are dispatched to the employer's fabrication shop - Employer having applied all terms of ICI agreement except travel allowance to shop as a matter of practice - ICI agreement not specifically addressing off-site activities - Agreement indicating that shop work will be the subject of a separate shop agreement - No separate shop agreement - ICI agreement not applying to shop - Estoppel argument dismissed - Grievance dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *Donald W. Wilson*, *Fred Wilson*, *Harry Cybulski*, *Brian Cavan* and *Fred Smith* for the applicant; *Cecil Kalyn* and *Jim Vair*, student-at-law, for the respondent; *J. Cameron Nolan* for the intervener.

DECISION OF R. O. MACDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER R. M. SLOAN: July 14, 1988

I

1. This is an arbitration proceeding which comes before the Board pursuant to section 124 of the *Labour Relations Act*. The union contends that certain of its members were entitled to travel allowance when they were dispatched to work at the employer's "fabrication shop" at 3450 Landmark Road in Burlington. That location is 2.1 miles beyond the "free zone" established by Appendix G, item I., of the ICI provincial collective agreement. The provision on which the union relies is as follows:

TRAVEL ZONES AND ALLOWANCES

1. There shall be an area known as Zone 1, which will be a free area inside the limits of which no travelling allowances will be paid. This free area is within a radius of seven (7) miles from the Hamilton Automobile Club, 393 Main Street East, Hamilton. In going to work outside Zone 1 (free zone) and returning daily, the workman shall be at the job at regular starting time and work a full shift.
2. The limits of the seven (7) mile free zone (known as Zone 1) may be jointly laid out by identifiable roads during the terms of this Agreement.
3. A travelling allowance of 40 cents per mile shall be paid from the boundaries of the free zone to the job and return each day over shortest normally travelled route.
4. The maximum travelling allowance shall be twenty-five dollars (\$25.00) per day worked. The parties agree that all jobs situated in the Stelco LED site shall be paid on the basis of a maximum of 27 miles from the boundaries of the free zone to the Stelco LED site. Maximum travel allowance shall change to reflect change in mileage allowance.

2. The respondent company does not dispute that its shop is beyond the boundary of the "free zone". The company asserts, however, that no travel allowance is payable because the ICI agreement has no application at that location. In the company's submission, the work at its Bur-

lington facility is more properly characterized as “manufacturing” rather than “construction work”, and, that, consequently, the ICI agreement does not apply. The company relies on Article 1.3 and 3 of the provincial collective agreement:

1.3 “Contractor” means an employer performing Mechanical work in the Industrial, Commercial, and Institutional Sector of the Construction Industry under the terms of this Collective Agreement and any successor or assign.

3.1 This is a Provincial Agreement within the meaning of the Labour Relations Act of Ontario and as such applies to the Industrial, Commercial and Institutional Sector of the Construction Industry.

The company also asserts that it has never paid travel allowance to union members working at its Burlington shop and that union officials were aware of that practice, so that even if the agreement nominally applies, the union is estopped from asserting its present claim.

3. To complete the contractual framework in which this case must be decided, it may be useful to briefly refer to Article 24 of the provincial agreement:

ARTICLE 24

FABRICATION

24.1 All piping machines, whether power or manually operated, which are required to perform piping fabrication work on the job or Contractor’s fabrication location, shall be operated by members of the Union. All pipe work installed by the contractor on the job site shall be cut and fabricated by members of the Union. Contractors who fabricate piping off the job site shall register the fabrication location off site with the Union and shall employ members of the Union to perform the work. The above shall not be deemed to include regular items of self-contained packaged equipment, with associated integral piping normally listed in manufacturers’ catalogues. All piping 2” and under shall be fabricated in the jurisdiction of the Local Union where the work is to be installed.

24.2 Where the word “shop” is used in this section it shall be defined as a shop under agreement with the United Association or one of its local Unions in the Province of Ontario.

24.3 Contractors who will be fabricating in a shop outside of the Union jurisdiction wherein the fabricated materials are to be installed must comply with the following, prior to commencing fabrication (regular Union label shops need not comply with this requirement).

“Notify Business Managers or Business Agents for the Union, in writing, on the company letterhead, where fabricating and where fabricated materials are to be installed”.

24.4 Both the Union and the employer acknowledge that exceptions may arise where the employer is required to install equipment such as skid mounted vessels, pumps, driers, exchangers, etc. Prior to commencement of this work, where the employer is required to install such components and if the matter cannot be mutually resolved between the employer and the Union, it shall be immediately referred to the Provincial Joint Advisory Board for an immediate solution.

24.5 Item one and two are not intended for use in comfort heating and plumbing.

24.6 Subject to existing jurisdictional agreements between trades, decisions of record, or established area practice, all brackets, hangers and pipe supports that are not specifically itemized and listed in a standard manufacturers’ catalogue, are to be fabricated by members of the Union.

*Refer to "Letter of Understanding"

LETTER OF UNDERSTANDING

RE: ARTICLE 24

It is recognized and understood that certain installations dictate a special requirement for prefabrication of piping 2" and smaller.

Generally this situation occurs for special process of welding, bending or joining of piping that is non-standard, and requires speciality skills, a controlled environment or special welding procedures.

The union agrees to install such piping that may be prefabricated outside of its geographic jurisdiction in the province of Ontario, provided that the prefabrication is done in a U.A. Shop with a U.A. Licence Agreement or by the Contractor at his shop under the Terms and Conditions of this Agreement.

November 29, 1982

Article 24 of the provincial collective agreement contemplates the possibility of pipe fabrication on the job site, at a fabrication location, or in an employer's shop requiring the skills of union members, and specifies certain conditions under which such work must be done.

II

4. The respondent company is an electrical and mechanical contractor. It has been in the construction business for more than 25 years and has collective bargaining relationships with a number of trade unions including the present applicant. The applicant's bargaining rights precede the provincial bargaining scheme which came into effect in 1978. The respondent is a member of the Mechanical Contractors Association of Hamilton, ("MCAO") a component of the Mechanical Contractors Association of Ontario. MCAO is the designated employer bargaining agent for employers working in the ICI sector of the construction industry.

5. The company acknowledges that it is bound by the ICI provincial collective agreement insofar as its construction activities are concerned. The company has always applied the ICI agreement (and its predecessors) to all of its on-site construction and fabrication work. In addition, the company has always applied the ICI agreement or its predecessors to its Burlington shop. Union members working at the shop from time to time were routinely hired through the union hiring hall, and were paid the stipulated wage rates and benefits. Union dues were deducted and remittances made to the various trust funds established pursuant to the ICI agreement. The company has never paid travel allowances but, until the present controversy, it has willingly applied all of the other terms of the provincial collective agreement to its shop in Burlington.

6. Cecil Kalyn is the company's President and General Manager. He explained that the bulk of the company's economic activities were "construction oriented", so that it was convenient to use the same tradesmen and payment system for all aspects of its business, rather than set up separate payrolls. However, in Mr. Kalyn's submission, there is no document which obliges the company to apply the ICI agreement to its shop operation, and in particular, to the activities which he describes as "manufacturing". The company has applied the ICI agreement as a matter of long-standing practice and commercial convenience.

7. The question of travel allowances has come up from time to time, over the years, but has never been pressed to a definitive legal resolution. Ten or twelve years ago (i.e. probably before the onset of province-wide bargaining) an individual believed by Mr. Kalyn to be an "act-

ing” business agent raised the matter and was told that the agreement did not apply to a permanent location such as the company’s Burlington shop. The evidence does not establish the office of the person to whom the company refers, nor his authority (if any) to speak on behalf of the union. Nor does the evidence establish the collective agreement terms then in force. More recently when *employees* have raised the question of travel pay they were told either that it had no application to a permanent shop, or that the shop in Burlington was within the travel-free zone. The latter explanation was accepted until Fred Wilson, the current Business Manager of Local 67, tested that proposition and determined that the shop was, in fact, 2.1 miles beyond the travel-free zone. It was that determination which prompted the present grievance.

8. Some 90% of the company’s business involves the fabrication and installation of material on construction sites. Only 10% of its business is undertaken within the confines of its building on Landmark Road. That 10% may itself be subdivided into three categories: systems which it assembles for installation on construction sites by its own forces; systems which are installed on construction sites by other construction subcontractors; and articles which are sold to buyers outright - in which case the company has no knowledge of how or by whom the equipment may be installed. In each category, though, the company uses members of Local 67 both in the fabrication phase and, when necessary, for installation purposes. That is why the company finds it convenient to rely on the local hiring hall to supply skilled tradesmen, and has historically drawn no distinction between its shop and on-site activities. Members of the applicant (and other trade unions) are recruited, as needed, to work in the shop or on-site, and when their phase of the work is completed they are laid off. Mr. Kalyn testified that the work force in the shop ranges from 5 to 50 employees from various trades, depending upon the level and type of activity in which the company is engaged from time to time. As in the case of the applicant, the company routinely applies the applicable ICI agreement to the work being performed by the other trades.

9. The evidence respecting the kind and mix of work done at the company’s shop is both unclear and somewhat contradictory. Cecil Kalyn testified that only 5% of the work was “construction related”, and 95% was what he described as “manufacturing”. He explained that by the term “manufacturing” he was referring to orders from customers for specific pieces of equipment which were assembled in Burlington then shipped to the customer’s place of business. He cited two examples: a bolt heat treatment furnace which was built and shipped to a manufacturer in Montreal, and a water treatment system which was built for Ecodyne Limited and eventually put into use in the Alberta oil fields. In both cases the company called upon the hiring hall for pipefitters and welders and laid them off when their work was completed. In cross-examination Mr. Kalyn conceded that the shop does do some fabrication in connection with its construction activities. Indeed, at the present time he said that 100% of its work force at Landmark Road is engaged in the fabrication of systems for installation at a large Stelco construction project at Nanticoke. When asked whether the company had been engaged in any other major projects since 1986, Mr. Kalyn mentioned one for Dofasco which lasted for two and a half months and also involved a number of UA members fabricating pipe, taking it to the site, and installing it. Mr. Kalyn pointed out however that most of the fabrication work is actually done on the job site.

10. Brian Cavan is a welder and member of the applicant, UA Local 67. He has worked for the company on a number of occasions in a variety of capacities. In late 1986 he worked in the shop on material for the Dofasco project mentioned above, until the job moved to the site (inside a steel mill). According to Mr. Cavan, at about the same time he installed pipe on the bolt heat treatment furnace. He was switched from task to task as required. As we have already noted, the furnace is an example of what Mr. Kalyn considers “manufacturing”. Mr. Cavan has also worked for the company on a number of local construction sites, but has never received travel allowance

because none of them were outside the free zone. Nor did he receive travel allowance when dispatched to work in the shop.

11. Fred Smith is a steamfitter and a member of UA Local 67. He was dispatched to work at the shop in Burlington when the company called the union hiring hall and requested two fitters and three welders. Mr. Smith worked on the Ecodyne water treatment system and the furnace project mentioned above. He was laid off at the end of January. He was not paid any travel allowance.

III

12. Although given notice of these proceedings, the designated employer and employee bargaining agencies - that is, the entities that actually negotiated the current provincial collective agreement - did not appear to make representations as to its application to an employer's "shop" facility. There was no direct evidence concerning the bargaining parties' intentions, or, indeed, whether any of the many employers bound by the provincial agreement (other than the respondent) applied some or all of its terms to their shop work, or some of it. We were not told what the industry practice is, or the practical ramifications of a determination that the provincial agreement applies, in whole or in part, to shop workers who may be associated in their work or bargaining with "on-site" construction workers. Nor were we told whether employers have (or purport to have) distinct "shop agreements" for their fabrication facilities, separate from the ICI agreement (although we observe that, for some trades, separate shop agreements are quite common). Neither party in these proceedings referred us to the potential impact of section 117(b) of the Act, or the ambit of Article 24 of the agreement. We are left therefore, with the language of the collective agreement and the limited evidence before us.

IV

13. Articles 1.3 and 3 of the provincial agreement restrict its application to the ICI sectors of the construction industry. Those provisions, on their face, do not specifically address off-site activities undertaken in an employer's shop. Pursuant to section 117(b) it might have been open to the provincial bargaining agencies to indicate, unequivocally, that shop work was covered by the agreement, but they have not done so. At best, these provisions are ambiguous.

14. Article 24 of the agreement is the only one which expressly contemplates work of the kind which the respondent does at its Landmark Road facility. However Article 24 does not specify that fabrication work must be done only in accordance with the terms of the ICI agreement, and, in fact, Article 24.2 suggests the contrary. Article 24.2 defines the term "shop" as one under agreement with the U.A. or one of its local unions in the Province of Ontario. But the U.A. is not, *by itself*, the designated employee bargaining agency, nor, of course, is a local union entitled to enter into an agreement or other arrangement affecting construction work in the ICI sector without the express authorization of the designated bargaining agencies (see section 146 of the Act). Accordingly, the language of Article 24.2 which, we repeat, deals with a fabrication location or fabrication shop, appears to contemplate a separate and distinct shop agreement with the U.A. or one of its locals rather than the ICI agreement. If employers who engage in ICI construction as well as fabrication in their own shops were intended, automatically, to be covered by the ICI agreement, it is difficult to understand why Article 24.2 would speak of shops under *separate* agreement with the U.A. or one of its local unions. In our view, the implication of section 24.2 is that shop work, however it is characterized, will be the subject of a separate shop agreement either with the U.A. or one of its locals. Here there is none.

15. The travel allowance provision also requires careful scrutiny in light of the way in which

the terms “job”, “job site”, “fabrication location” and “shop” have been used in Article 24 which deals with off-site fabrication locations such as the one operated by the respondent at Landmark Road. In our view Article 24 and the travel allowance clause must be read together.

16. Article 24 distinguishes specifically between a “job” or a “job site” (the terms are used interchangeably) on the one hand, and an employer’s “shop” on the other. The implication is that they are distinct kinds of business activity. Work on a job or job site is one thing; work in a shop is another. However item I dealing with travel zones and allowances only applies to roving “jobs” or “job sites” in which a contractor may be engaged from time to time. It does not, on its face, apply to travel to and from a permanent “shop”. While the general term “job” found in the travel allowance provision might be broad enough, ordinarily, to include work at a shop, when read together with Article 24, we do not think that this was the bargaining parties’ intention. In this agreement jobs or job sites are distinguished from shops.

17. Does the doctrine of estoppel assist either party in this case? We do not think so — although both parties rely upon it.

18. The union contends that because the employer has applied most of the terms of the collective agreement to its shop and the union has dispatched workers to that location on the understanding that it would do so, the employer is obliged to apply *all* of the ICI terms, including the travel pay requirement. For its part, the employer argues that the union has been “officially” aware of its travel pay practice for many years because of the above-noted conversation with the individual believed by Mr. Cavan to be an “acting” business agent for the union, and it cannot now seek to collect travel pay.

19. In neither case do we find these “estoppel” arguments persuasive.

20. From the company’s perspective, we do not think that the application of *some* provisions of the ICI agreement to its shop constitutes a representation that *all* of the terms of the ICI agreement will be applied - especially when that has not been its practice. In appropriate circumstances, the doctrine of estoppel may be invoked to prevent the alteration of a practice not supported by the terms of a collective agreement; however, we are unaware of any case in which estoppel has been relied upon to require an employer to provide a benefit that has neither been promised nor applied before. From the union’s perspective, we are not persuaded that some sketchy conversation, many years ago, with some unidentified purported union representative constitutes a representation from the union that it would not seek to enforce a travel pay requirement. Leaving aside the question of whether section 146 of the Act precludes local arrangements, by estoppel, which deviate from the terms of the provincial collective agreement, we are simply not satisfied that in this case the elements of estoppel have been made out.

21. We mention these matters merely for the purpose of completeness and because they were addressed by counsel in argument.

V

22. In summary, then, on the basis of the evidence and argument before us, we cannot conclude that the bargaining parties intended that the ICI agreement would apply to the respondent employer’s activities in its shop; nor can we conclude that the term “job” in the travel pay provision, when read together with Article 24 which distinguishes job sites from shops, contemplates the payment of travel allowance when tradesmen are dispatched to the latter.

23. For the foregoing reasons, and subject to the reservations already stipulated, we are satisfied that this grievance should be dismissed.

DECISION OF BOARD MEMBER RENE R. MONTAGUE: July 14, 1988

1. I disagree with the interpretation the majority gives to Article 24. I agree that the word "job" in Appendix G, item 1 is broad enough to include work at the shop. In my view, Article 24 cannot be interpreted so as to limit the application of the travel allowance provision. In the particular circumstances of this case, *where* the work is performed is irrelevant.

2. I would have allowed the grievance.

0244-88-R Richard Nolan, Applicant v. Labourers' International Union of North America, Local 1081 and Labourers' International Union of North America, Ontario Provincial District Council, Respondent v. **E. R. Masonry Ltd.**, Intervener

Construction Industry - Termination - Applicant never obtained a referral slip with respect to his employment with the employer - Whether applicant to be included in the unit for purposes of s.57(3) - Board finding respondent waived the referral slip requirement - April Waterproofing not applicable - Vote ordered

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

APPEARANCES: *Michael G. Horan* and *Richard Nolan* for the applicant; *L. Steinberg* and *K. Rimmington* for the respondent; *Joseph N. Tascona*, *Mario Piccinin* and *Raffaello Piccinin* for the intervener.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER W. N. FRASER:
July 4, 1988

1. The name of the applicant is amended to "Richard Nolan".

2. This is an application, under section 57 of the *Labour Relations Act*, for a declaration that the respondent trade union no longer represents the employees of E. R. Masonry Ltd. ("E. R.") in a bargaining unit described, in Article 1 of the provincial agreement between the Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario and The Labourers' International Union of North America and the The Labourers' International Union of North America, Ontario Provincial District Council, as follows:

all construction labourers, including masons or bricklayers tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, and all other construction employees engaged in the industrial, commercial and institutional sector of the con-

struction industry in the Province of Ontario, for whom the respondent has bargaining rights, save and except non-working foremen and persons above the rank of non-working foreman.

The provisions of the Act relevant to this application are sections 57(2)(a) and 57(3) which provides that:

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

3. In a termination application under section 57 of the Act, the Board must determine the wishes of the bargaining unit employees concerned. Section 57(3) of the Act and section 73(1) of the Board's Rules of Procedure preclude the Board from receiving evidence of the employees wishes other than in writing. The legislation also stipulates that the employees who are said to no longer wish to be represented by a trade union must have arrived at that decision voluntarily and that the written evidence thereof, in the form of a statement of desire or petition (the terms are synonymous), is a true expression of their wishes and not those of someone else.

4. In accordance with the Board's Rules of Procedure, E. R. filed a list of employees in the bargaining unit and a specimen signature for the one person, the applicant, whose name appears on Schedule "A" thereof. It was common ground between the parties that, subject to an argument by the respondent trade union based on the principle in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577, the applicant was the sole employee in the bargaining unit on the date the application was made. On the basis of the material before it, and having regard to the agreement of the parties, the Board found, subject to the respondent's *April Waterproofing* argument, that there was one employee in the bargaining unit at the time the application was made.

5. The statement of desire ("petition") filed in support of this application is dated April 27, 1988. It contains the original signature of the employee in the bargaining unit.

6. The respondent does not contest the timeliness of this application. Nor does it seriously argue that the petition is not a voluntary expression of the applicant's true wishes. However, it does strenuously argue that the applicant was not hired in accordance with the terms of the provincial agreement binding upon E. R. and that he should therefore not be included in the bargaining unit for purposes of section 57(3) of the *Labour Relations Act* in accordance with the principle in *April Waterproofing*.

7. The applicant and Raffaello Piccinin, President of E. R., testified before the Board. The respondent called no witnesses.

8. The applicant was employed by E. R. for a short period in August and early September, 1987 at which time he was laid off. It appears that he was not a member of the respondent at that

time, although it seems that he did have some discussions about becoming one with Keith Rimmington, a business agent for the respondent, and did pay \$100.00 of the respondent's \$300.00 initiation fee. In March 1988, the applicant was working for Leo Jan Masonry, ("Jan"). At the end of the month, he was laid off because of a shortage of work and he called E. R., among other companies, looking for work. Also, and before he had any offer of employment, he attended at the respondent's office in Cambridge and became a member by paying a \$300.00 initiation fee and membership dues of \$11.00 per month for the months of March, April, and May, 1988. Subsequently, he again telephoned E. R. for work and was offered a job which he started on April 5, 1988.

9. The applicant telephoned the respondent within a week of starting to work for E. R. and told a person he believed to be the receptionist that he had "gone from Jan to E. R.". She took his name and telephone number and told him that she would bring the matter to Mr. Rimmington's attention. At no time did anyone advise the applicant, or E. R., that he had to obtain any referral, authorization, or other thing or document in order to work for E. R.

10. Subsequently, the applicant became concerned that there might be a strike which would cause him to lose time from work. He discussed this with Rob Weiss, a bricklayer apprentice employed by E. R. with whom he had first become friendly when they worked together in August and September, 1987. Weiss obtained the name of and an appointment with Mr. Horan, and drove the applicant to that appointment. The applicant signed the petition in Mr. Horan's office and it and this application were subsequently filed with the Board. He also gave Mr. Horan a retainer and testified that he will be paying Mr. Horan's fees himself.

11. The applicant took part of April 27, 1988 off from work to attend at Horan's office. He told E. R. that he needed the time off to attend to some personal business. He returned to work in the afternoon and worked for several hours. He was not paid for any time which he did not actually work.

12. Articles 2.01, 2.02, 3.01(a) of the Master Portion of the provincial agreement referred to in paragraph 2 hereof, and Article 14.01 of the respondent's schedule of the provincial agreement provide that:

ARTICLE 2 - UNION SECURITY, WORK
JURISDICTION, ASSIGNMENT
OF WORK, SUBCONTRACTING

2.01 The Employer agrees to employ only members in good standing of the Local Union specified in Article 1.03 for work covered by this Agreement.

2.02 As a condition of continuing employment, all Employees shall maintain in good standing their membership in the Local Union.

ARTICLE 3 - HIRING OF EMPLOYEES

3.01 The following provision will apply to the hiring of all Employees except as specifically provided for elsewhere in the Master Portion. Trade Appendices and Local Schedules."

(a) The Employer agrees to call the Local Union by 1:00 p.m. for its needed supply of men for the following day. All Employees hired through the Union shall present to the Employer a referral slip from the Union prior to commencing employment. It is understood that if the Local Union having jurisdiction over the work is unable to provide the required men within 24 hours the Employer is free to hire such labour as is available, but such labour shall acquire a referral slip, prior to commencing work on

the second day after hiring, and as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

The Local Unions shall be allowed forty-eight (48) hours to supply men to jobs beyond thirty (30) road miles from the point of origin as defined in Schedule "B" hereto.

ARTICLE 14 - RECALL

14.01 Under the provisions of Article III - Paragraph 3.01, of the Master Portion, the Employee when adding to his work force shall have the prerogative of first rehiring any employee who has been in his employ during the preceeding twelve (12) months of the date of rehire, and such employees shall as a condition of employment, be members in good standing of the Union, Employees that have been rehired shall obtain a referral slip from the Union within two (2) working days of the date of rehire. it is understood that employers may only recall those employees that are unemployed at the time of recall.

13. The evidence establishes that since December 1986, when the respondent was certified with respect to the company, E. R. has hired eight employees, other than the applicant, covered by this provincial agreement. Of these, four were hired directly, and four were hired through the respondent. None of them ever produced a referral slip from the respondent. Indeed the respondent has given E. R. some leeway in applying the collective agreement by allowing the company a "try out" period of 6 to 8 days before an employee even had to become a member of the respondent. E. R. has made the requisite reports and remittances with respect to all of its employees, including the applicant, represented by the respondent, both during the try out periods and otherwise. There is no doubt that the respondent knew that the applicant was employed by E. R. and, with an exception of an inquiry by Rimmington on (coincidentally) the day this application was made with respect to why E. R. had not recalled another former employee, Mike Donelle, rather than the applicant, there is no evidence or even suggestion that the respondent took any issue with the employment of the applicant by E. R., or made any suggestion that he was not properly an employee in the bargaining unit, until after this application was made.

14. In *April Waterproofing Limited, supra*, the Board was faced with a displacement certification application in which the applicant trade union relied upon the support of two employees who had been hired contrary to the terms of the incumbent trade union's collective agreement which required that all new employees should be members of the incumbent union and hired through its hiring hall. In dismissing the application the Board stated, at paragraph 8, that:

8. There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervenor. That by itself, however, is not determinative of their status as bargaining unit employees. See Local 273, *International Longshoremen's Association v. Maritime Employers' Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

(see also *Corecon Construction Limited*, [1987] OLRB Rep. Dec. 1480).

15. Subsequently, the Board has held that the *April Waterproofing* principle does not apply in circumstances where the affected individuals are "pre-existing" employees in the sense that they were not hired in violation of any existing or inchoate collective agreement (see *Cullitan Brothers Limited*, [1983] OLRB Rep. Mar. 339; *Inducon*, [1983] OLRB Rep. July 1038). Further, in declin-

ing to apply the *April Waterproofing* principle in *Pierre A. Gratton Construction Inc.*, [1986] OLRB Rep. Jan. 137, the Board stated, at paragraph 11:

11. Obviously the potential for mischief in a situation of unlawful hiring is, as the Board has repeatedly pointed out, considerable. Accordingly, the Board, particularly with its knowledge of the construction industry, has not hesitated to presume, in the words of *Inducon, supra*, that the employer intended the natural consequences of his acts. That presumption is rebuttable, however, in the face of cogent evidence, and the Board on the evidence before it in the "sale" application is unanimously of the view that the principals of Grager were acting in good faith, and did in fact believe that the new, merged undertaking was not the subject of the shelved Pierre Gratton Construction Inc.'s collective agreement. We are satisfied that the principals of Grager made no effort whatever to hide the operations of "Grager" from the intervener Labourers' Union; in fact, they willingly hired individuals whom they knew to have been members of the Labourers' Union through their prior employment with "Gratton". The "Grager" company was in the field bidding on and performing jobs in the high-profile Transitway project for a substantial period of time before the Labourers', through their counsel, began to assert their claims. While the race is not simply to the swiftest, the Board can expect some measure of diligence in the unique world of construction, where unions know they must move quickly to organize or assert bargaining rights before a project is completed. Here the Carpenters' Union expended its recourses in a good-faith effort to organize the apparently unrepresented employees of "Grager", and it is the decision of the Board that their application for certification is entitled to proceed, on the basis of the persons "employed" as of the date of certification.

It is evident that the principle in *April Waterproofing* is one of limited application.

16. The respondent opposes this application almost solely on the basis that the applicant never obtained a referral slip from it with respect to his employment by E. R. If a trade union wishes to rely on a referral slip system, it must use and enforce it. The respondent has not done so with respect to E. R. and we are satisfied that, insofar as E. R. is concerned, the respondent effectively waived the referral slip requirement during any time material to the Board's considerations herein and specifically with respect to the applicant. By its actions, or inaction, the respondent accepted the applicant as an employee in the bargaining unit on and prior to the date this application was made. In our view, E. R. employed the applicant in substantial compliance with the collective agreement between the parties. Further, this is not a case where the employer has manipulated the list of employees, withheld information from the respondent or the Board, or sought to mislead the respondent in order to gain an advantage. In short, the circumstances are not such that the concerns that gave rise to the principle in *April Waterproofing* exist and we decline to apply it in this application.

17. Accordingly, we are satisfied that the applicant was an employee in the bargaining unit for purposes of this application.

18. We are further satisfied that the petition is a voluntary expression of the wishes of the applicant.

19. The Board is therefore satisfied, on the basis of the evidence before it, that not less than forty-five percent of the bargaining unit employees or E. R. Masonry Ltd. at the time this application was made, have voluntarily signified in writing that as of May 11, 1988, the terminal date established for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for ascertaining the wishes of the employees under section 57(3) of the Act, that they no longer wish to be represented by the respondent trade union in their employment relations with E. R. Masonry Ltd.

20. Therefore, pursuant to section 57(3) of the *Labour Relations Act*, the Board directs that

a representation vote be taken of the bargaining unit employees of E. R. Masonry Ltd. for whom the respondent is presently the bargaining agent.

21. All persons employed in the bargaining unit described in paragraph 2 of this decision on the date hereof who are so employed on the date the vote is taken shall be eligible to vote.

22. Voters will be asked to indicate whether or not they wish to be represented by the respondent trade union in their employment relations with E. R. Masonry Ltd.

23. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG; July 4, 1988

1. I agree with the majority that the termination application is timely and a voluntary expression of the applicant's true wishes. However, the applicant was not hired in accordance with the terms of the provincial agreement binding upon E.R. Masonry Ltd., the intervener.

2. The applicant Richard Nolan was the sole employee on the date the application was made, and therefore should not be included in the bargaining unit for the purposes of section 57(3) of the *Labour Relations Act*. In accordance with the principles set out in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577.

3. Article 3 of the Provincial Agreement provides that hiring of employees:

3.01 The following provision will apply to hiring of all Employees except as specifically provided for elsewhere in the master portion. Trade Appendices and Local Schedules.

a) The Employer agrees to call the Local Union by 1:00 p.m. for its needed supply of men for the following day. All Employees hired through the Union shall present to the Employer a referral slip from the Union prior to commencing employment. It is understood that if the Local Union having jurisdiction over the work is unable to provide the required men within 24 hours the employer is free to hire such labour as is available, but such labour shall acquire a referral slip, prior to commencing work on the second day after hiring, and as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

...

4. The applicant was not a member of the bargaining unit on the date of application for termination. The application should be dismissed.

3227-87-R Evaristo Romero, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 27, Respondent v. Ideal Railings Limited, Intervener

Parties - Petition - Termination - Timeliness - Application filed on same day as Minister appointed conciliation officer timely - Applicant having status to bring application as an employee in the bargaining unit although not a member in good standing of the union - Vote ordered

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

APPEARANCES: *Michael Horan* and *Evaristo Romero* for the applicant; *Douglas J. Wray* and *F. D'Abbondanza* for the respondent; *D. B. Francis* and *James Church* for the intervener.

DECISION OF THE BOARD; August 2, 1988

I

1. This is an application under section 57 of the *Labour Relations Act* to terminate the bargaining rights which the respondent union currently holds for a bargaining unit described as follows:

[All] employees of Ideal Railings Limited working at and out of Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office, sales and clerical employees.

The application raises three issues: whether the proceeding is timely, having regard to section 61(2) of the Act; whether the applicant, Evaristo Romero, was an employee in the bargaining unit at the relevant time and therefore had "status" to bring the application; and, whether the document filed in support of the application represents the voluntary wishes of the individuals who signed it. We shall deal with each of those issues, in turn. The provisions of the *Labour Relations Act* to which reference will be made are as follows:

57.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

61.-(2) Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have

elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or

- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

II

2. This application was filed on March 1, 1988. On that same day the Minister of Labour appointed a conciliation officer. The union argues that, in accordance with section 61(2), the appointment of the conciliation officer precludes the current challenge to its status as bargaining agent.

3. We do not agree. The plain words of section 61(2) stipulate that no termination application can be made *AFTER* March 1st, the date when the Minister appointed a conciliation officer. The section does not use the terms “on or after”, and therefore must be construed as prohibiting a challenge to the union’s status as bargaining agent only *after* March 1st; that is from March 2nd onwards. Where, as here, both the termination application and the appointment of a conciliation officer occurred on the same date, it cannot be said that the application was made *after the date* when the conciliation officer was appointed so as to attract the bar contemplated by section 61(2).

4. We find support for this view in *Riverdale Hospital*, [1981] OLRB Rep. June 778 where the Board had to consider the effect of what was then section 9(2) of the *Hospital Labour Disputes Arbitration Act*. That section (modelled on the language of section 61(2)) provided that “an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement ... shall not be made after the day upon which the agreement ceases to operate or the day upon which the Minister appointed a conciliation officer, whichever is later ...”. The Board considered that language and said this:

The application and copy of the letter appointing the conciliation officer which was filed with the respondent’s reply establish, *prima facie*, that the application was made on the same date as the conciliation officer was appointed. Since the collective agreement expired December 31, 1980, the date of the appointment of the conciliation officer is the date by which timeliness is to be determined pursuant to section 9(2). Since the application was made on the same day as the officer was appointed and not “... after the day upon which ... the Minister appointed a conciliation officer ...” the Board finds the application to be timely within the meaning of subsection (2) of section 9 of the *Hospital Labour Disputes Arbitration Act*.

There is no material distinction, in our view, between the word “day” found in section 9(2) of the *Hospital Labour Disputes Arbitration Act* and the word “date” found in section 61(2) of the *Labour Relations Act*. We find that this application is timely.

III

5. Section 57(2) of the Act provides, in part, that “any of the employees in the bargaining unit defined in a collective agreement may ... apply for a declaration that the trade union no longer represents the employees in the bargaining unit”. In the union’s submission Mr. Romero, the applicant, is not an employee in the bargaining unit within the meaning of section 57(2). The union takes this position because Mr. Romero has not paid union dues for some time and it is said that he is therefore not a member in good standing of the union as is required by the collective agreement. Section 6 of that collective agreement reads as follows:

ARTICLE 6 - UNION SECURITY

- 6.01 All present employees as a condition of employment shall remain Union members in good standing, if they are already Union members and if they are not, shall become Union members within 30 days after the signing of this Agreement, and shall remain members in good standing. All new employees shall, as a condition of employment, become and remain members in good standing of the Union within 30 calendar days of employment.
- 6.02 New employees when hired shall be sent to the Union office to obtain a referral slip.
- 6.03 Present employees who are not yet members of the Union shall within 30 days be required to pay an initiation fee and to become a Union member. New employees upon completion of their probationary period shall be required to pay an initiation fee to become a Union member.

Students employed during the school vacation period shall only e required to obtain a work permit from the Union.
- 6.04 In order to maintain membership in good standing in the Union, employees must pay monthly Union dues and assessments as fixed by the Union. Such monies must be paid by the employees at the Union office.
- 6.05 The Employer shall discharge any employee who fails to comply with any of the provisions of this Article.

The union submits that Mr. Romero is not fulfilling an essential condition of employment and, therefore, should not be treated as an employee in the bargaining unit for purposes of section 57 of the Act.

6. The employer points out that a grievance respecting an alleged violation of Article 6 was filed in November 1987. It resulted in this settlement, dated April 11, 1988 (i.e. more than a month after the filing of this application):

AGREEMENT
BETWEEN: IDEAL RAILINGS LIMITED
(the "Employer")
- and -
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
LOCAL 27
(the "Union")

Whereas the Union filed a grievance dated November 9, 1987 and referred said grievance to arbitration;

And whereas the parties wish to resolve the grievance;

Now therefore the Union and the Employer agree as follows:

- (1) The Employer agrees that it is bound by the collective agreement with the Union.
- (2) The Employer shall provide a list of all its current employees setting out their names, date of hire, date of termination (if applicable), Social Insurance Number, address, classification and wage rate. This list shall be provided to the Union by no later than April 20, 1988.
- (3) The Union will then have the opportunity to seek voluntary compliance by the employees with their obligation under Article 6 of the collective agreement between the parties. The Union shall advise the employer by no later than May 4, 1988 of the names of any employee who has still not complied with Article 6 of the collective agreement.

(4) The Union and the Employer shall then provide a joint notice to any employee who has not complied with Article 6 that they shall be discharged if they do not comply with Article 6 by no later than May 11, 1988.

(5) The Employer agrees effective from the date hereof to send all new employees when hired to the Union office to obtain a referral slip, as provided for in Article 6.02 of the collective agreement.

(6) The parties agree to adjourn the arbitration scheduled for April 11, 1988. If there is any dispute concerning the interpretation, application or administration of this Agreement, such dispute may be referred back to the arbitrator.

(7) This Agreement is made without prejudice to the position of either party in any other application, complaint, action, grievance or any other proceeding.

Dated at Toronto this 11th day of April 1988

FOR THE EMPLOYER:

FOR THE UNION:
F. D'ABBONDANZA

"J. D. Church"

"F. D'Abbondanza"

As of the filing of this termination application, no move had been made by the trade union under Article 6.05 of the agreement to compel the employer to discharge Mr. Romero or any other "employee". It should also be noted that Mr. Romero was an employee of the intervener long before the union acquired its bargaining rights and that he was only one of a large number of employees who had failed to pay union dues. Indeed, it is conceded that at the time this application was made only a small number of the intervener's employees were paying union dues and therefore were union members "in good standing".

7. The difficulty with the union's position is that it is inconsistent with the terms of the collective agreement upon which it is purportedly based. That agreement - and in particular Article 6.05 - makes it perfectly clear that the obligation of employees with respect to union membership and the payment of dues, is distinct from "employment" in the bargaining unit. An employee who fails to comply with the obligations imposed by Article 6 may be subject to discharge, but until such discharge is actually effected s/he remains an employee in the bargaining unit defined above. The applicant and other recalcitrant dues payers continue to work for the employer, for wages, much as they did before, and they continue to meet the literal wording of the recognition clause and what it means, at law, to be an "employee". There is no suggestion here that the employer has somehow manipulated the employee complement so as to avoid its contractual obligations, nor is the employer in this case obliged to resort to the union hiring hall in order to fulfill its employee requirements. There is no evidence that the applicant or anyone else was *hired* contrary to the terms of the collective agreement, and no issue of the "inchoate" rights of out-of-work union members who should have been hired if the terms of the collective agreement had been followed. At most, one has a failure by certain employees to fulfill obligations imposed upon them *personally* by the terms of the agreement, and a decision by the union not to require the discharge of such employees as contemplated by Article 6.05. The principles and the concerns expressed in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577 have no application in the circumstances of this case. We are satisfied that the applicant was an employee in the bargaining unit at the relevant time.

IV

8. In order to determine whether the employee statement opposing the union represents

the voluntary wishes of those who signed it, the Board heard considerable evidence, from many witnesses, about its origination, preparation and circulation (see Rule 73). It is fair to say (and conceded by all parties) that the testimony in this regard was far from satisfactory. The various witnesses gave quite contradictory versions of precisely when the petition was signed, where it was signed and whether anything was said, at the time, about the applicant's intention to retain a solicitor to represent the objecting employees' interests or how the costs of this proceeding would be shared. The employee witnesses had different recollections about whether they had signed in the parking lot, or the lunch area, or the washroom, or during a break, or during working hours. Furthermore, much of the evidence was given with the assistance of an interpreter, and the frequent use of nicknames or colloquial references made it necessary for the Board to require the brief presence of some of the excluded witnesses in order that their identity could be confirmed.

9. Some of the inconsistencies and contradictions can no doubt be traced to the usual difficulty encountered by untrained witnesses in recalling events which occurred some months before and were not considered significant at the time. There was also a tendency for partisans (whether consciously or unconsciously) to cast events in the pattern most favourable to their particular positions. Nevertheless, when the evidence is considered as a whole, certain important themes emerge.

10. In the first place, in the weeks and months preceding this application, there was considerable dissatisfaction among employees about the quality of representation they were receiving and the benefits to be gained by continued union representation with its consequent obligation to pay union dues. By the time this application was made, only a minority of employees remained union members in good standing; moreover the concern of the others was heightened by the union's threat in November 1987 to obtain the discharge of any employee who did not pay the amounts, including arrears, required by Article 6 of the collective agreement. Under Article 6.04 of the collective agreement each employee in the bargaining unit is required to go, once a month, to the union hall to pay his/her dues (there is no automatic "check-off" by the employer). There is no doubt that at the time of this application a number of employees either found that payment method inconvenient, or otherwise questioned the utility of continued support for the union.

11. There is no evidence of any managerial involvement in the origination, preparation or circulation of the petition opposing the trade union. There is no evidence that the employer has provided any financial or other support to the applicant, or taken a public position in this matter one way or the other. There is no evidence to support the conclusion that the employer was or could reasonably have been believed to be behind the application. None of the several union witnesses who gave evidence suggested that there was actual management involvement or even that management involvement was feared because of the circumstances in which they themselves signed the anti-union petition. These union witnesses, who originally supported this application, changed their minds later, but there was not the slightest suggestion that, at the time they signed the anti-union petition, they were not reflecting the same generalized dissatisfaction which the evidence suggests was shared by many other members of the bargaining unit. The union witnesses contradicted Mr. Romero as to the precise time or place where they had signed the petition, but they did not say that they were influenced or worried by the actual or perceived hand of management when they did so; and they did not register any concern about their job security or fear that their support or opposition to the union would be communicated to their employer and might result in reprisals. Nor would the evidence before us support such apprehension. Yet the union now urges that we find that the anti-union petition is "involuntary".

12. Counsel for the union in his thorough and thoughtful argument carefully reviewed the evidence, pointing out its contradictions and inconsistencies, and drew the Board's attention to all of the relevant jurisprudence. However the basic question remains: did the employees who signed

the anti-union petition in late February 1988 do so voluntarily? We are satisfied that they did. Notwithstanding the difficulties with some of the testimony, we are satisfied on the basis of the totality of the evidence before us that forty-five per cent of the employees in the bargaining unit at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on March 22, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

13. The Board directs that a representation vote be taken of the employees of Ideal Railings Limited employed in the bargaining unit described in paragraph 1 above. All those employed in that bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Ideal Railings Limited.

15. The matter is referred to the Registrar.

1117-87-R United Food and Commercial Workers International Union Local 175 and 633, Applicant v. Miracle Food Mart, Steinberg Inc.; and Loeb's IGA, Respondents

Sale of a Business - Steinberg closing its food store and opening up an Ultra Mart store in the vicinity - Store site taken over by IGA - Whether sale from Steinberg to IGA - Board reviewing sale of a business jurisprudence in the retail food industry - Assumption that goodwill would attach to the location not sustainable because two stores in competition - No sale

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Douglas J. Wray and John Hurley for the applicant; D. Brent Labord and John Peardon for the respondents Miracle Food Mart, Steinberg Inc.; Lynn H. Harnden, Peter Best and Richard Knight for the respondent Loeb's IGA.

DECISION OF S. A. TACON, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN: July 4, 1988

1. This is an application under section 63 of the *Labour Relations Act* in which the applicant, the United Food and Commercial Workers International Union Local 175 and 633 (the "Union"), asserts that the transaction between Miracle Food Mart, Steinberg Inc. ("Steinberg") and Loeb's IGA ("Loeb") in respect of a site at 457 Wharnccliffe Road South in London constituted a "sale" within the meaning of the Act.

2. The parties agreed on a statement of facts. Further, two witnesses testified: J. Peardon (Director of Labour Relations, Steinberg) and R. Knight (owner/operator of the IGA store at 457 Wharnccliffe Road South). Having weighed and assessed the *viva voce* testimony in the context of the agreed statement of facts, the documentary evidence and what is reasonably probable in the

circumstances, the Board makes the following findings of fact. The agreed statement of facts is not set out separately but, for convenience of exposition, is incorporated in the Board's factual findings.

3. It is useful to clarify terminology. The location at 457 Wharncliffe Road South was first operated as a Miracle Mart store (store 278) and, after the transaction in question, as an IGA store (hereinafter referred to as the "IGA store" or as "Wharncliffe IGA" where necessary to distinguish that site from another IGA store opened subsequently). A new Ultra Mart store was opened by Steinberg at Wonderland and Commissioners Road in London ("store 292" or "Ultra Mart").

4. Steinberg operated store 278 since 1956 as one of four Miracle Mart retail supermarkets in London. A fifth store location (store 266) had already been closed as unprofitable by the time 278 ceased operations. Steinberg is a party to what may be described as virtually a province-wide collective agreement with the applicant. In 1985, Steinberg decided to open a new Ultra Mart store, its first in London. In connection with that decision, the company's Ontario Division prepared a feasibility study, including an executive summary and overview of the London market for 278 as well as the other Miracle Mart stores. Store 278 was regarded as a profitable location. The Ontario Division recommended that store 278 continue in operation following the opening of the Ultra Mart, although proposing renovations to store 278 to lessen the impact on 278's performance of the Ultra Mart opening. That recommendation was rejected by the corporation which stipulated that approval of the Ultra Mart location required the closure of store 278 coincident with the opening of the new store and a financially attractive disposition of the lease and assets of 278.

5. In connection with that corporate decision, a real estate agent was retained to canvass interest in 278's premises. That agent contacted Loeb, a competitor of Steinberg in the retail food market business. Subsequent discussions between Steinberg and Loeb culminated in a Letter of Agreement and sub-lease. The Agreement was subject to the condition that Steinberg open a new store at Wonderland and Commissioners in London on or before November 30, 1987. Further, the Agreement stipulated that Loeb would pay \$250,000.00 to Steinberg for leasehold improvements and the other equipment then situated at store 278. The fixtures at 278 were fully depreciated and, given the nature of the Ultra Mart store, it was unlikely those fixtures would be suitable for the new location. The formal sub-lease between Steinberg and Loeb was executed on March 16, 1987. The sub-lease to Loeb included a premium over the lease cost to Steinberg reflecting its increase in market value over the years in which Steinberg was lessee. The Bill of Sale executed on June 18, 1987 listed the assets covered. Store 278 closed on June 20, 1987. During the week of June 22 to June 27, Steinberg cleared and cleaned the store and vacated the premises by June 27. The Ultra Mart opened on June 22, 1987.

6. Store 278 is approximately 1.5 miles from the Ultra Mart (1.8 miles by the most direct automobile route). Store 278 may be described as a "conventional" retail food supermarket, both within the Steinberg chain and within the industry at the time, with 25,000 square feet of space. In contrast, the Ultra Mart is significantly larger (roughly 60,000 square feet) and predicated on the concept of "one stop" shopping. Intended as the "flagship" or model of Steinberg's new line of store, the Ultra Mart is a combination store with traditional food items plus other products organized in a "boutique" system. For example, there is a corner deli, fish market, bakery, pharmacy, cosmetics, seasonal merchandise (e.g. children's winter clothing), cheese-pizza boutique, pasta boutique, butcher shop, bulk food and flower boutique.

7. As a large, combination store, Steinberg expected that the Ultra Mart would have a larger trading area than a regular Miracle Mart and would encompass 278's existing trading area. Indeed, Steinberg developed a number of strategies and incurred substantial expenditures to

attract business to the Ultra Mart and, particularly, from 278's trading area. For example, customers holding a store 278 Miracard were to be issued automatically with a cheque cashing card for the Ultra Mart store, an Ultra Miracard, with an explanatory letter encouraging customers to take their business to the Ultra Mart location. Signage at 278 (while 278 was still in operation) announced the upcoming closing of that location and invited customers to the Ultra Mart store. Photographs and information were to depict some of the exciting distinctions of the new store. Employees at 278 were to invite and encourage shoppers to shop at the new location. Store 278's busing programme from the downtown core was to be continued but to the Ultra Mart location. Moreover, a well-publicized busing programme from 278's trading area was to be instituted for seniors and apartment dwellers. The programme involved a host/hostess to assist users of the service. The busing programme had been instituted when another Steinberg location had been closed, had proven successful and had continued. The new service in 278's area was an extension of that programme to facilitate retention by Steinberg of customers with limited mobility. For the four weeks prior to the Ultra Mart opening, significant discounts were offered on house brand pop as the empty bottles could only be returned at Steinberg stores. It was felt that customers would likely travel to the Ultra Mart store to return the bottles and, once there, would be desirous of shopping at Ultra Mart thereafter. Bag stuffers outlining the main features of the Ultra Mart store and introductory coupons were distributed generally to Steinberg's customers at all stores but, at 278, a more detailed handbook was to be given out. The opening of the Ultra Mart was to be heavily advertised through newspapers, flyers, invitations in writing and by telephone, and signage and "celebrated" with coffee and cake for customers on opening day. As well, a programme to minimize the impact of the new IGA store at 278's premises was to be developed.

8. The Ultra Mart store was covered by the applicant's collective agreement. The employees at 278 exercised their seniority under the collective agreement to transfer to the Ultra Mart or, in a very few instances, to other stores of their choice. At 278, there were roughly 25 full-time and 80 to 100 part-time employees. The Ultra Mart location employs approximately 350 persons with a higher ratio of part-time and full-time employees than at 278.

9. Steinberg's opening plan for the Ultra Mart store included financial data indicating weekly sales targets and projected market share. While the new store slightly exceeded its target for opening week, its sales projections thereafter have shown a short fall of roughly \$75,000 weekly. The busing service to Ultra Mart from the downtown core and 278's trading area continues its weekly operation and is used by some 40 customers.

10. Peardon testified that the London area is considered a rather sizeable homogeneous market without "ethnic" pockets and with less definition to individual trading areas than in other centres of similar size. That is, the mobility of London residents means that any particular store may draw customers from a wider area and areas not directly related to distance travelled. Peardon stated that, in the London area, there was a higher incidence of customers driving past one Miracle Mart, for example, to shop at another Miracle Mart. The London market was idiosyncratic in other respects as well. For example, customers in that region used coupons extensively and participated heavily in contests. Peardon also expressed the view, based on his experience, that renovations almost always have a positive impact on market share.

11. R. Knight has had considerable experience in the retail food business working as a produce manager for Dominion at its Westmount Mall store and then with A & P. He initiated discussions with Loeb in 1985 regarding a possible IGA franchise in London. At that time, Loeb only operated the distribution centre and a Cash 'n Carry in the area. Those discussions progressed over two years to the point where Knight was asked which of two locations Loeb was considering (278's premises and a site at Southdale Road and Montgomery) he would prefer *if* he was given a choice.

Because of his high profile in the Wharncliffe area based on his residence, community involvement and workplace, Knight felt the 278 site offered a better chance of becoming a successful retailer. As well, Knight considered the Loeb organization possessed a strong marketing strategy and supervisory staff to assist franchisees. In fact, Knight was offered and accepted a franchise at the Wharncliffe location.

12. Loeb occupied the Wharncliffe premises as of June 29, 1987 and conducted substantial renovations from June 29 to July 13. The renovations included considerable electrical and plumbing work. Some of the equipment which had been purchased as a requirement of the sale was extensively modified, some was cannibalized for parts and the rest discarded as useless. New cash registers and checkout stands were installed as well as new shelving and shopping carts. The exterior front of the store was sandblasted, repaired and repainted and new signage installed. In all, \$900,000.00 was expended on leasehold improvements and almost \$500,000.00 on inventory. Loeb's engineering staff was responsible for the renovations which were charged to Knight as were the leasehold improvements, equipment and inventory. Knight physically took possession as franchisee on July 13.

13. The IGA store emphasizes fresh produce and meat over a more conventional supermarket line and, specifically, 278's merchandise. The produce area was doubled over that of 278 and grocery department size and product range was halved. The deli department was expanded to include cheese and fresh pizza; a fresh fish section and an in-store bakery added. The ethnic food section was eliminated and the frozen food department reduced. Service is stressed, including free carry out service for customers. Advertising is not conducted through the newspapers because of the cost. Rather, a price catalogue is issued every five weeks followed up with a reminder page in the local "Pennysaver", a weekly advertising supplement, which is distributed within roughly a one and a half mile radius of the store.

14. The IGA store opened on July 14 with an open house on the previous evening at 7:00 p.m. Invitations to the opening were sent in what was regarded as the IGA market area. Free samples emphasized the "fresh" approach of the store. To combat Steinberg's strategy of selling discounted pop in the weeks prior to the closure of 278 and the opening of the Ultra Mart location, Knight redeemed the Miracle Mart in-house brand bottles and absorbed the loss. As well, a portable sign indicating an IGA would soon be opening was erected almost immediately upon Loeb's taking possession of the premises from Steinberg. The IGA store has prospered, attracting a higher weekly customer count than did 278. Knight testified that his weekly sales were in roughly the same range as for 278 but the customer composition, in his view, differed, reflecting the service level, marketing strategy, "freshness" emphasis, etc.

15. Knight described what he regards as his market area. This overlaps with the Ultra Mart store which he considers his major competitor but extends as far as Lambeth because of ready accessibility to the IGA store despite the distance involved. Knight agreed with Peardon's assessment of the London market as highly mobile. Knight testified that customers are not as loyal to a particular store or location as in the past nor is a "locked-in" trade characteristic of the London market. A market review conducted by Loeb of the proposed IGA site examined the population and supermarket potential of the site, competitive supermarkets, defined primary and secondary market areas and included an analysis of the specific site in terms of visibility, parking spaces, etc. The analysis assumed that most of 278's sales originated from the defined primary market area and estimated 278's share of that primary market area as 31% while noting a 42% share was leaking out to other major competitors. The market review referred to downside risks of an IGA at the 278 site as well as advantages and opined that, if the 24 hour per day operation was continued, a bakery, delicatessen and cheese counter added and combined with the IGA warehouse programme

and service, an IGA on the 278 site could maintain a large percentage of existing sales. If properly equipped and promoted, a new IGA could easily surpass those sales primarily due to lack of existing IGA representation within the London market and the patronage factor of IGA shoppers from outside the market area. With respect to the market review, Knight agreed with the assessment that sales would be drawn from an area much broader than the defined primary market area, largely because his store was the only IGA location in London at the time. Knight also agreed with the estimate of leakage from his primary market area to outside competitors.

16. The Board next sets out the able and thorough submissions of counsel in a highly abbreviated form. It should be noted that counsel for the respondent Steinberg Inc. did not attend the proceedings subsequent to the testimony of its witness, Peardon, and did not make representations.

17. Counsel for the applicant first reviewed the general principles outlined in the jurisprudence dealing with section 63 of the Act. It was argued that section 63 was intended to provide permanence to collective bargaining rights, that such rights attached to the business irrespective of ownership. Regard must be had to the totality of the transaction including the nature of the work performed and goodwill. In the retail food industry, it was asserted that location was consistently considered of critical importance and the concept of goodwill attached to the location itself. Counsel contended that the analysis established in the early cases still applied, particularly where assets were also transferred and the hiatus between the closure of one store and the opening of another was relatively brief, unless it could be established that the two enterprises targeted different customers, as in ethnic specialty stores. In the instant application, counsel reviewed the evidence in some detail, stressing that the business was the same as that of the predecessor, goodwill attached to the location in the circumstances and the hiatus was extremely brief. It was submitted that both Steinberg and IGA had “gambled” on their respective assessments of the ability of each to siphon off or retain the customers of store 278. While it might be said that IGA appeared to have been more accurate and Knight had sought to put his “stamp” on the enterprise, counsel contended a sufficient number of factors constituting a sale of the business or at least a part of a business within the meaning of section 63 were present. In reply, counsel emphasized that store 278 was financially viable and, indeed, the Ontario Division’s of Steinberg had recommended its continued operation. Not to find a sale, he submitted, would deprive the applicant of what otherwise would have been obtained through accretion of its bargaining rights. That is, had the Ontario Division’s recommendation been adopted, the applicant would have represented employees at both the Ultra Mart and 278 given the scope clause of its collective agreement with Steinberg. Further, it was stated that the primary market areas of the Ultra Mart and IGA stores were different. Cases referred to in support include: *Marvel Jewellery Limited and Danbury Sales*, [1975] OLRB Rep. Sept. 733; *Denis Moran Limited*, [1977] OLRB Rep. Apr. 237; *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Provincial Fruit Company (Ottawa) Limited*, [1975] OLRB Rep. Nov. 830; *Clean & Brite Laundry*, [1980] OLRB Rep. July 957; *Dutch Boy Food Markets* (1965) 65 CLLC ¶16,051; *L & M Food Market (Ontario) Limited*, [1965] OLRB Rep. Sept. 440; *Leader’s Clover Farms Food Market*, [1966] OLRB Rep. Nov. 636; *Zehrs Markets Limited*, [1974] OLRB Rep. May 331; *Gordons Markets A Division of Zehrmart Limited*, [1978] OLRB Rep. July 630; *Gordon Markets*, [1978] OLRB Rep. Dec. 1102; *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486; *Canada Safeway Limited*, [1986] OLRB Rep. Nov. 1498; *Canada Safeway Limited*, [1986] OLRB Rep. Mar. 305; *Super Tops Holdings Inc.*, [1986] OLRB Rep. Jan. 168; *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. Mar. 425; *Gilham Foods*, [1984] OLRB Rep. Oct. 1423; *Valencia Foods*, [1984] OLRB Rep. May 773; *I.G.A.*, [1984] OLRB Rep. Apr. 604; *Queensway Foods Ltd.*, [1984] OLRB Rep. Feb. 358; *Vaunclair Meats*, [1982] OLRB Rep. May 581; *Shiffer-Hillman Clothes*, [1983] OLRB Rep. May 764; *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887; *Do-Tan Manufacturing Limited*, [1984] OLRB Rep. Oct. 1388.

18. Counsel for the respondent agreed that the successor rights provision in section 63 was intended to protect union and employee interests when businesses were transferred but asserted that, in the instant case, the applicant's existing bargaining rights had already been preserved in that the Ultra Mart store was covered by the applicant's collective agreement. Counsel argued that the emphasis given to location in section 63 context in the retail food industry should be re-examined given his assertion that the era of the corner grocery store with a "locked-in" trade had passed. The special characteristics of the London market were related, as were Steinberg's marketing strategies intended to move clientele from store 278 to the Ultra Mart. Counsel reviewed the evidence in support of his submission that the instant case involved a major player in the retail food industry moving elsewhere within the same market area and actively competing with Knight. In turn, it was argued Knight relied on his personal following in the neighbourhood and put far more than his "stamp" on the store. Rather, he transformed the physical location into "his" store. Counsel reviewed the jurisprudence in support of his contention that a "going concern" had not been transferred and, in particular, distinguished *More Groceteria*, *supra*, as the high-water mark of the "location equals patronage" approach. Cases cited included: *Keele-Wilson Supermarket Limited*, *supra*; *Dominion Stores Limited*, [1979] OLRB Rep. July 626; *Sunnybrook Food Market*, [1966] OLRB Rep. Oct. 531; *Queensway Foods Ltd.*, *supra*; *More Groceteria Limited*, *supra*; *Gilham Foods*, *supra*; *Valencia Foods*, *supra*.

19. Section 63 of the *Labour Relations Act*, in part, reads:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

20. In dealing with section 63 applications, the Board has traditionally accorded a liberal meaning to both the term "business" and "sells". The Board has recognized section 63 is intended to provide some stability and permanence to collective bargaining rights, to insulate those rights from the vagaries of commercial transactions where the enterprise continues, at least in part. Whether a particular commercial transaction constitutes the "sale" of a "business" or "part of a business" is a factual determination reflecting the totality of the specific circumstances. Various indicia have been noted in the jurisprudence including, the nature of the work, location, physical assets, managerial expertise, goodwill, company name, customer lists, accounts receivable, inventory, restrictive covenants, and hiatus in the operation. Moreover, it has been acknowledged that

particular configurations of factors leading to a conclusion that a “sale” has occurred may differ considerably from industry to industry or between sectors of the economy. In any specific instance, the Board must determine whether what has been transferred is merely a collection of assets or an ongoing enterprise (or, at least, a distinct and severable segment of that ongoing enterprise). Those themes are expanded in numerous decisions and need not be elaborated on further: *Vaunclair Meats Limited*, *supra*; *Antonacci Clothes Inc.*, *supra*; *Shiffer-Hillman Clothes*, *supra*; *Denis Moran Limited*, *supra*; *Clean & Brite Laundry*, *supra*; *Gordons Markets a Division of Zehrmart*, *supra*; *Queensway Foods Ltd.*, *supra*; *Valencia Foods*, *supra*.

21. Within the retail food industry, the jurisprudence has generally stressed location as a critical factor, virtually equating that location with goodwill and patronage: *Dutch Boy Food Markets*, *supra*; *Provincial Fruit Company (Ottawa) Limited*, *supra*; *Leader's Clover Farms Food Market*, *supra*; *Canada Safeway Limited*, *supra*; *More Groceteria Limited*, *supra*. The premise that customers will continue, through habit, to patronize the same retail food location notwithstanding a change in ownership is not inviolate. Thus, where the “goodwill” was dissipated due to a lengthy hiatus between the closing of one operation and the reopening of another, a sale has not been found: *Gilham Foods*, *supra*; *Zehrs Markets Limited*, *supra*; *I.G.A.*, *supra*. Likewise, where the new operation targeted a specific ethnic community, the “location equals patronage” analysis has been rejected and the Board concluded there was no sale within the meaning of the Act: *Keele-Wilson Supermarket Limited*, *supra*; *Super Tops Holdings Inc.*, *supra*; *Queensway Foods Ltd.*, *supra*; *Valencia Foods*, *supra*. Yet another circumstance wherein the concept of location as encompassing patronage is not applicable occurs when the vendor may be said to remain in competition with the purchaser in the same market area. This aspect, while not necessarily articulated as such, was implicit in *Dutch Boy Foods Markets*, *supra* and *Leader's Clover Farms Food Market*, *supra* and expressly noted in *Sunnybrook Food Market*, *supra* and *Dominion Stores Limited*, *supra*.

22. It is not suggested that the cases noted above turn exclusively or even primarily upon the presence or absence of one particular factor. Rather, in each instance, the Board determines whether there has been a continuation of the predecessor's business wherein the successor operation drew its life from the predecessor (to paraphrase *Gordons Markets a Division of Zehrmart*, *supra*) or, conversely, the establishment of a parallel business of a similar nature, in particular, an expansion of a pre-existing business: *Valencia Foods*, *supra*; *Queensway Foods Ltd.*, *supra*.

23. The Board next examines the circumstances of the instant case in the context of these principles. At first blush, it would appear that a number of factors point toward a “sale” within the meaning of the Act. Both store 278 and IGA operate a retail food store of a similar nature, not targeted to any specific ethnic community, and notwithstanding the emphasis on “fresh foods” and service at the IGA store. That is, the addition of the fresh fish section, in-store bakery, cheese and pizza sections and carry-out service do not combine to characterize the IGA store as a different operation from 278 for the purposes of section 63. In addition to acquiring the premises, Knight, through Loeb, purchased fixtures and equipment at 278, albeit the equipment was modified, cannibalized and/or discarded as useless. Knight also secured a sub-lease to the premises from Steinberg which included a premium to reflect the increased market value. Finally, the hiatus was extremely brief - 278 closed on June 20, 1987 and the IGA opened on July 14 with an open house the previous evening.

24. However, other elements negate a conclusion that an ongoing enterprise was passed from Steinberg to IGA. Most critical is the evidence that, as a result of the transaction, Steinberg and IGA were in direct competition and the assumption of patronage attaching to location cannot be sustained in the instant case. Steinberg rejected the Ontario Division's recommendation and

required that store 278 be closed and its assets disposed of at a financially attractive price as a condition of approving the Ultra Mart store. The equipment and fixtures at 278 were fully depreciated and not suitable for transfer to the Ultra Mart location because of the different concept of the latter store. Thus, those fixtures and equipment, for Steinberg, were “idle and unwanted assets” in themselves. Steinberg not only intended to retain a presence in the area but developed a comprehensive strategy to draw its 278 customers to the Ultra Mart location. The agreement with Loeb was subject to the condition that the new store at Wonderland and Commissioners (the Ultra Mart location) open *before* the deal closed (and Steinberg was to vacate 278’s premises within one week of the closing date). The strategies to move 278’s customers to the Ultra Mart are recounted in detail in paragraph 7 above and need not be repeated at length here. Examples included automatically issuing an Ultra Miracard to 278’s customers, signage and photographs at 278 before closing, invitations by employees at 278 to their customers to visit Ultra Mart, the busing programme from 278 to Ultra Mart, discounts on house brand pop at 278 in the weeks before that store closed and a handbook of coupons and information specifically targeted at 278’s patrons.

25. It is in this competitive context that the brief hiatus between 278’s closure on June 20 and IGA’s reopening on July 14 is to be understood. On a personal level, Knight had to generate income as soon as possible to offset the considerable outlays for leasehold improvements, fixtures and inventory. Beyond this, IGA was expanding its operations into the London market through its franchisee, Knight. The Loeb market review stressed the lack of existing IGA representation within the London market and the patronage factor of IGA shoppers outside the immediate area as important elements in its assessment that an IGA store at the 278 location could easily surpass 278’s sales volumes. IGA and Ultra Mart were in competition for a share of the same market area. The stores themselves are less than two miles apart. While Knight concentrated his advertising in the immediate vicinity because of the prohibitive costs of wider ads, Ultra Mart did advertise throughout the London area and persisted in its efforts to attract and retain the customers who formerly patronized the 278 location. For example, the busing programme continues in operation to date. While the numbers utilizing the service are not high, it must be inferred from its continuation that Steinberg’s regards the service as warranted. For his part, Knight sought to counter Steinberg’s strategies, for example, by redeeming the Miracle Mart in-house brand pop and absorbing the the loss. Thus, it cannot be said in the instant case that the local patronage of 278 attached to that location. Rather, as vendor, Steinberg sought to dispose of the unwanted assets at 278, although the store itself was profitable, as part of its corporate decision to open the Ultra Mart. Both before and after the legal transaction occurred, Steinberg deliberately planned to counter any “affinity” 278’s customers had to continue to patronize that location. On the other hand, Knight sought to counter those measures and counted on the IGA name to draw customers.

26. In reaching this conclusion, the Board has considered, as well, the idiosyncrasies of the London market, as attested to by Peardon and Knight. Both are regarded as candid witnesses and testified that the mobility of London residents meant that the local trading areas were less defined and any particular store may draw customers from a wider area and areas not directly related to distance travelled. The market review conducted by Loeb supports this testimony in its assertion that 42% of 278’s share of its primary market area (as defined in the survey) leaked out to other major competitors. The absence in the London area of a “locked-in” trade further undermines the applicability of the “location equals patronage” approach and the evidence in the instant case contrasts with the assumptions about neighbourhood grocery stores in such cases as *More Groceteria Limited*, *supra*.

27. Counsel for the applicant asserted that, had Steinberg continued to operate 278 as well as opening the Ultra Mart, the applicant would have held bargaining rights at both locations. That statement is undoubtedly accurate given the scope clause of the applicant’s collective agreement.

However, Steinberg rejected the recommendation of its Ontario Division and insisted on closing 278 as a condition of approving the Ultra Mart. The fact that 278 was profitable at the time does not determine whether a “sale of a business” within the meaning of the Act has occurred. In this regard, though, it should be noted that the Ontario Division also proposed extensive renovations to 278 to lessen the anticipated impact on 278’s performance once the Ultra Mart opened. Thus, even the Ontario Division saw the two Steinberg stores as “competing” for the same customers. Counsel also referred to the similar sales volumes at IGA and 278 as indicative of a retention of 278’s customers. The Board does not agree. While the volumes are in the same range, in the Board’s view, that is reflective of the draw of the IGA name and Knight’s entrepreneurial activities in the face of Steinberg’s marketing strategies rather than the result of a “locked-in” trade. Applicant’s counsel also argued that sufficient factors were present to warrant a finding that, at least, part of 278’s business had been transferred. Again, the Board does not agree that a “definable, severable segment” of 278’s operation was transferred to IGA, as that term has been fleshed out in the jurisprudence: *Vaunclair Meats Limited*, *supra*; *Antonacci Clothes Inc.*, *supra*; *Schiffer-Hillman Clothes*, *supra*.

28. On balance, the Board regards the instant circumstances as more analogous to the expansion of the existing business of IGA into the London area (*Queensway Foods Ltd.*, *supra*; *Valencia Foods*, *supra*) than a sale. For the foregoing reasons, then, the Board finds that the transaction did not constitute a sale of a business within the meaning of section 63 from Steinberg to Loeb/IGA.

29. Accordingly, this application is dismissed.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG; July 4, 1988

1. I cannot agree with the decision of my colleagues. In my view there was a sale of a business by Miracle Food Mart, Steinberg Inc. to Loeb’s IGA in respect of a site at 457 Wharncliffe Road South, London.

2. The location at 457 Wharncliffe Road South, operated as a Miracle Mart Store, and after the transaction as an IGA store.

3. In *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at para. 32 the Board said:

Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, and collective agreements regulates the conditions of work for employees in those groups, and the purpose of section 55 [now 63] is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55 [now 63]. This approach has been taken by the Board in a number of cases (see *Culverhouse*, *supra*, and *Dennis Moran*, [1977] OLRB Rep. Apr. 277)...

4. I find the employer Loeb’s IGA became the buyer, in acquiring the right to operate a food store formally used by Miracle Food Mart, Steinberg Inc. premises.

5. Therefore, Loeb’s IGA is the successor employer of the store at 457 Wharncliffe Road South, London, and is bound to the collective agreement with the United Food and Commercial Workers International Union, Local 174 and 633.

2590-87-R International Union of Operating Engineers, Local 793, Applicant v. Peter Kiewit Sons Co. Ltd., Respondent v. Employee, Objector

Certification - Construction Industry - Parties - Practice and Procedure - Petitioner attending hearing as an observer but not participating - No notice of continuation of hearing sent to petitioner - Whether Board should adjourn in order for notice to be given - Petitioner not entitled to notice of continuation of hearing - One must attend hearing as a party in order to receive notice - Certificates issuing - Board directing that petitioner be sent copy of the decision

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Harold F. Caley* and *Jack Slaughter* for the applicant; *Daniel J. Shields* and *Alex Drummond* for the respondent; no one appearing for the objector.

DECISION OF THE BOARD; July 8, 1988

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board further finds, pursuant to section 144(1) of the Act, that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent filed a list of employees indicating that there were five employees in the bargaining unit on the date of the making of the application. The applicant filed acceptable evidence of membership with respect to three of these employees. In these circumstances, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 7, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. The applicant has challenged the accuracy of the list of employees filed by the respondent. Given what follows, however, it appears that no useful purpose would be served by inquiring into this challenge.

7. One of the individuals who signed a union membership card also filed a statement indicating that he no longer supported the applicant. The Board has a long-established practice of exercising its discretion under section 7(2) of the Act to direct the taking of a representation vote on the basis of such a statement. Before it will do so, however, the Board must be satisfied that the apparent change of heart on the part of an employee who had previously become a member of the trade union was not motivated by a perceived threat to his job security or a concern that a failure to sign the document would be communicated to his employer and result in reprisals.

8. The Board's general practice is not to reveal the names of employees who have signed a statement in opposition to an application for certification. Individuals who come forward to testify as to how such a document came into being and the circumstances under which it was signed must, of course, identify themselves. If a statement proves not to be numerically relevant, that is, if it cannot affect the union's entitlement to be certified, or if it is numerically relevant but no one comes forward to testify as to its origination or the circumstances under which it came to be signed, the Board's practice is not to reveal the name of any employee who signed it. In the instant case the individual who filed the statement in opposition to the application was not in attendance at the hearing into the application on June 9, 1988. At that time, however, counsel for both the applicant and the respondent indicated that they were aware that the individual in question was Mr. James Thiessen.

9. The application for certification was filed on December 17, 1987. Mr. Thiessen's statement in opposition to the application was dated January 1, 1988, and received by the Board on January 5, 1988. The statement contains a return address on a rural route in St. Catherines. The Board is not required to hold a hearing with respect to construction industry certification applications. The instant application was, however, listed for hearing to deal with all matters arising out of and incidental to the application, including a claim by the respondent that the Board lacked jurisdiction to entertain the application as well as the issue of the weight to be accorded to the statement filed in opposition to the application. On January 20, 1988 the Board's Registrar forwarded to the respondent a Form 79 "green sheet" addressed to employees which the respondent was directed to post so as to advise employees of the hearing. Because he had filed a statement in opposition to the application, the Registrar forwarded a separate notice of hearing to Mr. Thiessen at the St. Catherines address referred to on his statement. Part of the notice read as follows:

3. The purpose of the hearing is to receive the evidence and representations of the parties respecting all matters arising out of and incidental to the application, including, in particular:

- (a) the issues raised in the Reply respecting whether the Board has jurisdiction to entertain the application; and
- (b) the weight, if any, to be given to the statement filed in opposition to the application.

4. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

...

NOTES AND COMMENTS

1. Where the purpose of the hearing includes an inquiry into a statement of desire filed by an employee or group of employees, the attention of such employee or group of employees is directed to subsection 3(5) of the Board's Rules of Procedure which provides:
 - 73(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,
 - (a) the circumstances concerning the origination of the statement of desire; and
 - (b) the manner in which each signature on the statement of desire was obtained.
2. All communications should be addressed to:

The Registrar, Ontario Labour Relations Board,
400 University Ave.,
Toronto, Ontario M7A 1V4

10. The initial hearing into the application was held on February 25, 1988. That hearing was before a differently constituted panel of the Board. The parties are in agreement that Mr. Thiessen was in the hearing room on the day in question, but only as an observer. He did not participate in the proceedings and did not fill in an appearance sheet. The only issue addressed at the hearing on February 25th was the jurisdiction of the Board to entertain the application. After hearing from the parties on that issue, the Board reserved its decision.

11. On February 23, 1988, the Board received a copy of a letter from applicant's counsel indicating that he would no longer be representing the applicant. A copy of this letter was forwarded by the Registrar to all parties who had made filings with respect to the application. The copy forwarded to Mr. Thiessen at the rural route in St. Catharines was returned to the Board with a notation that he was no longer at this address.

12. The decision of the Board concerning its jurisdiction to entertain the application was issued on May 18, 1988. That part of the decision which recorded who had appeared at the February 25th hearing contained the statement "no one appearing for the objectors". In fact, Mr. Thiessen had been the only employee to object to the application. As noted above, while Mr. Thiessen had been in attendance on February 25th, he had not come forward to participate in the hearing and had not filled in an appearance sheet. In that Mr. Thiessen had not entered an appearance at the hearing, he was not sent a copy of the Board's decision. Further, in accordance with Board practice and paragraph 4 of the Notice of Hearing, he was not sent a notice advising the parties that the continuation of hearing would be held on June 9, 1988.

13. The continuation of hearing on June 9, 1988 came on before the instant panel of the Board. Mr. Thiessen was not in attendance. Counsel for the respondent advised the Board that it was his information that Mr. Thiessen was now living in Lethbridge Alberta. Counsel contended that Mr. Thiessen had been entitled to receive notice of the continuation of hearing, and accordingly the hearing should be adjourned to a later date so as to enable Mr. Thiessen to receive such

notice. This proposal was opposed by the applicant on the grounds that it had been Mr. Thiessen's own doing which resulted in him not receiving notice of the continuation of hearing. The applicant contended it should not be put to any additional time or expense as a result of what had occurred.

14. In accordance with the Board's rules, by filing a statement objecting to the certification application, Mr. Thiessen became entitled to participate in these proceedings as a separate party. He was sent a notice of hearing. As did the notices of hearing sent to the other parties, it clearly stipulated that if he did not attend at the hearing, he would not be entitled to any further notice in the proceedings. Attendance at a hearing reasonably means attending as a party, not merely as an observer. Mr. Thiessen did not attend the hearing on February 25, 1988 as a party. Further, Mr. Thiessen did not write to the Board to indicate that notwithstanding his lack of participation in the February 25th hearing, he desired to be notified of any subsequent hearing date. Given these considerations, we are satisfied, on the material before us, that Mr. Thiessen was not entitled to notice of hearing with respect to the continuation of hearing on June 9, 1988 and the fact he did not receive such a notice does not require that this matter be relisted for hearing.

15. The Board has before it no evidence relating to the origination of the statement filed by Mr. Thiessen or the circumstances under which it came to be signed. In these circumstances, we are not prepared to give the statement any weight.

16. Our conclusions set out above are based on copies of correspondence to and from the Board contained in the Board's file, as well as the submissions of the applicant and the respondent. In the event that Mr. Thiessen believes the factual basis on which we have based our decision to be in error, or that we have erred in our decision, he can request that the Board reconsider this decision pursuant to the provisions of section 106(1) of the Act. To this end, the Registrar is to forward a copy of this decision to Mr. Thiessen at the address provided to the Board by respondent's counsel at the February 9, 1988 hearing, namely:

Mr. James Thiessen
137 McGill Boulevard
Lethbridge, Alberta
T1K 3V9.

17. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

18. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all employees of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former

County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

0312-88-R Franco Pepe, Applicant v. Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 2041, Respondents v. Pino Drywall Construction of Ottawa Ltd., Intervener

Construction Industry - Termination - Timeliness - Union obtaining bargaining rights through voluntary recognition - Parties immediately bound by ICI agreement - Termination application brought a few months later after the commencement of the last two months of the agreement - Whether application untimely by virtue of s.123(2) - Open period in s.123(2) found to be in addition to open period in s.57(2) - Application timely

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Franco Pepe* and *Michael S. Ruddy* for the applicant; *Nancy Austin*, *Don Guilbeault*, *Maurice Potvin* and *Rene Seguin* for the respondents.

DECISION OF THE BOARD; July 8, 1988

1. This is an application for a declaration pursuant to section 57 of the *Labour Relations Act* terminating the bargaining rights of the respondents.

2. Both parties agree that the bargaining unit in question is a bargaining unit in the industrial, commercial and institutional sector (I.C.I.) of the construction industry, and that bargaining rights were obtained by virtue of a voluntary recognition agreement entered into on December 17, 1987, recognizing the Ontario Provincial Council and its affiliated bargaining agents. It is also common ground that pursuant to various provisions of the Act, upon the execution of the voluntary recognition agreement the parties became bound to the applicable I.C.I. provincial agreement.

3. This provincial agreement expired on April 30, 1988, and the application would accordingly be timely if the provisions of section 57(2) of the Act were applicable, in that the instant application was brought after the commencement of the last two months of the agreement. The respondents, however, assert that the application is untimely by virtue of the operation of section 123(2) of the Act. The applicable sections of the Act read as follows:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

(5) Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.

(6) Upon the Board making a declaration under subsection (4) or (5), any collective agreement in operation between the trade union and the employer that is binding upon the employees in the bargaining unit ceases to operate forthwith.

118. Where there is conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail.

123. (1) If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Notwithstanding subsection 57(2), any of the employees in the bargaining unit defined in a first agreement between an employer and a trade union, where the trade union has not been certified as the bargaining agent of the employees of the employer in the bargaining unit, may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit after the 305th day of its operation and before the 365th day of its operation.

(3) Subsections 57(3) to (6) apply to an application under subsection (1) or (2).

4. The respondents argue that the very wording of section 123(2) makes clear that it supplants or nullifies the provisions of section 57(2) and accordingly the only open period for applying for termination is as is contained in section 123(2); that is, after the three hundred and fifth day of the operation of the provincial agreement and before the three hundred and sixty-fifth day of its

operation. It is not disputed that the instant application is brought well after the three hundred and sixty-fifth day of the operation of the applicable provincial agreement. The question is whether the section 123(2) open period supplants, or is in addition to, the open period contained in section 57(2).

5. Before further considering this matter, we comment that it is not clear that the provisions of section 123(2) apply to I.C.I. provincial agreements (and therefore to the case at hand) and bargaining within that sector of the construction industry. On its wording, section 123(2) applies only to a “first agreement between an employer and a trade union”. In the I.C.I. sector the agreement is between the employer bargaining agency and the employee bargaining agency, and not between “an employer and a trade union” (although employers and trade unions can be bound by the agreement). Secondly, voluntary recognition by the employer caused the parties to become bound by the pre-existing provincial agreement (See, for example, *Culliton Brothers Limited* [1983] OLRB Rep. March 339), an agreement which was not the “first agreement” between the parties to the provincial agreement in question, but only the most recent in a series of provincial agreements between the same parties. It is not clear, therefore, that the particular provincial agreement is an agreement between an employer and a trade union or that it is, within the meaning in section 123(2), a “first agreement”. However, the parties did not suggest that section 123(2) was inapplicable to the I.C.I. sector, and accordingly we have dealt with the matter as if this subsection so applied.

6. In *International Union of Operating Engineers, Local 793 Re: Allan Gagnon*, [1986] OLRB Rep. August 1097, the Board considered the interaction between section 123(1) of the Act and the general termination provisions contained in the non-construction part of the Act in sections 57 and following. Although the critical question before the Board in that case was the application of section 61, and in particular section 61(1), the Board’s analysis of the interaction between the non-construction termination provisions and section 123 provisions remains applicable. Applying the provisions of section 118 of the Act, the Board therein concluded that the provisions of section 57, amongst others, would apply to construction industry termination applications, except insofar as such provisions were inconsistent with or overridden by the provisions of, for example, section 123. The Board concluded that the six month protected period contained in section 123(1) was inconsistent with the one year period contained in section 61(1), and to that limited extent the provisions of section 61(1) were held inapplicable. As the Board stated:

6. The only case of the Board to fully consider the relationship between the sections now before us is *K. J. Beamish Construction*, [1967] OLRB Rep. May 205. In that case the facts themselves were significantly different, in that although that termination application was also brought between six and twelve months after certification, the conciliation process was still ongoing. Section 123 makes no reference to the conciliation process at all, and the applicant in that case argued that, particularly in light of the “paramountcy” provisions of what is now section 118, section 123 set out the only test for timeliness (i.e., six months from certification). Faced with the prospect that the conciliation process in the construction industry could be interrupted in midstream by a termination application, the Board reasoned as follows, at page 211:

Section 96 [now 123] provides that if a trade union does not make a collective agreement within six months after its certification, any of the employees may apply for a declaration that the union no longer represents the employees. It is significant that section 91 [now 118] does not say that sections 5 to 89 shall not apply to the construction industry but declared merely that where there is a conflict between *any provisions* in sections 92 to 96 and *any provisions* in sections 5 to 89 *the provisions* in sections 92 to 96 shall prevail. The plain meaning to be drawn from the language of section 91, therefore, is that where there is a conflict in any of the provisions of section 5 to 89 with any of the provisions of sections 92 to 96, the former sections, less whatever parts of them conflict with the latter, shall, if reasonably capable of pertaining to the subject-matter, apply *mutatis mutandis* to the construction industry.

Comparing the time limits provided in the general provisions with those in the construction industry part of the Act, the Board then wrote, again at page 211:

Section 46(1) [now 61(1)] provides that where a trade union has not made a collective agreement within one year after its certification and notice has been given under section 11 and the Minister has appointed a conciliation officer of mediator, no application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate shall be made unless the conciliation process has been exhausted and the additional period of thirty days has gone by as provided for in either clause (a) or (b) of the section. Obviously, the only provision of section 46(1) which appears to conflict with section 96 [123] is the one year period. Section 91 [118], however, states that where there is such a conflict the provisions of section 96 are to prevail. It is manifest that if the period of six months provided for in section 96(1) is, following the direction of section 91, allowed to prevail and is, accordingly, substituted in section 46(1) for the one year period stated therein, any conflict existing between sections 96(1) and 46(1)(a) and (b) is automatically reconciled, with the result that the two sections may then co-exist and operate in harmony.

And, further, at page 212:

...It is obviously more compatible with legislative consistency and with the policy and sense of the legislation when read as a whole, that sections 45 and 46 were intended to complement and not to conflict with section 96. It is obvious that the provisions of sections 91, 93, 96, and 46, readily lend themselves to an interpretation which on the one hand permits them to co-exist in harmony and on the other manifestly serves to promote and advance the plain spirit and object of the legislation as a whole (i.e., to foster the conciliation process).

The application was accordingly dismissed.

7. What that case decided was that the one-year period referred to in section 61(1) was to be read, for construction applications under section 123, as a six-month period, and that the *additional* time limits relating to completion of the process of conciliation were applicable to the construction industry as well, and could, as in non-construction industries, extend the time during which bargaining rights are protected. ...

7. We agree with those comments as they reflect the view that the general provisions of section 57 continue to apply to termination applications in the construction industry, unless such application would result in conflict. Both open periods (in sections 57(2) and 123(2)) *could* stand without conflicting, but can the sections themselves both survive, given the opening phrase of section 123(2): “Notwithstanding section 57(2)”.

8. The respondents rely upon *R.L.D. Electric*, [1986] OLRB Rep. August 1145. In that case, a decision had issued certifying a union with respect to the I.C.I. sector and dismissing a separate certification application with respect to the same group of employees filed by an employee Association. Shortly after that decision issued, some employees applied to terminate bargaining rights, the application filed within the open period set out in section 57(2) of the Act. The Board was asked to apply its discretion pursuant to section 103(2)(i) and to bar the termination application, on the basis that there had only recently been a representation vote and consequent dismissal of the Association’s certification application, and the members of the Association were really seeking a further representation vote. The union argued it would be inappropriate to test the wishes of the employees so recently after the wishes had been tested during the certification process. As the certification had been for the I.C.I. sector and therefore upon certification the parties became immediately bound to the provincial agreement, the provisions of section 123(1) were not applicable. The Board in that case exercised its discretion to dismiss the termination application, basing its decision upon policy considerations suggesting that collective bargaining parties require a period of time in order to develop and nurture a bargaining relationship. The Board was satisfied that a ter-

mination application brought nine days after the certification decision did not provide that requisite period. As the Board stated in dismissing the application:

20. If this application is permitted to proceed and the applicant is able to establish that his petition represents a voluntary expression of those employees who signed it, the Board would direct the taking of a representation vote to determine if the employees wanted Local 353 to continue to be their bargaining agent. However, that very representation issue was determined a mere three weeks prior to the filing of this termination application by means of a representation vote. When the employees were confronted at that time with a choice between Local 353, the Association, or remaining non-union, the majority chose Local 353 as their bargaining agent. With this termination application, the applicant is requesting the Board to direct a further vote in which the bargaining rights of Local 353 would again be placed in issue a very short time after Local 353 acquired those bargaining rights by means of a representation vote. It appears to us that parties are entitled to a reasonable period of stability after a representation issue has been decided by a vote.

9. The respondents submit that they too are entitled to a period of stability without risk of termination in order to be afforded a realistic and meaningful opportunity to develop a sound bargaining relationship. That the respondents before us were voluntarily recognized by the employer is not, in the respondent's submission, a distinguishing feature. They submit that section 60 provides a basis upon which employees affected by the voluntary recognition can challenge such recognition, and that reading section 123(2) as overriding the provisions of section 57(2) would not deprive employees disenchanted with the voluntary recognition from challenging it. In this sense, the respondents submit that *R.L.D. Electric* is analogous, as here too an alternative test of employee wishes is available, albeit pursuant to the provisions of section 60.

10. In our view, section 123(2) (assuming it applies to termination applications in the I.C.I. sector) ought to be read as providing an open period for bringing termination applications in addition to the open period provided in section 57(2) of the Act. Although the wording of section 123(2) seems capable of either interpretation, from a labour relations policy perspective it makes considerably more sense to read this provision as providing an additional open period.

11. Section 123 contains provisions applicable generally to the construction industry, and they are clearly applicable to the non-I.C.I. sectors of the industry. In these sectors, we must keep in mind that the statute does not compel provincial agreements (see section 146 of the Act), by which parties are automatically bound upon the acquisition of bargaining rights. Rather, in the non-I.C.I. sectors, when bargaining rights are obtained by a bargaining agent, the parties meet and attempt to negotiate a collective agreement. Section 123(1) speaks to this scenario and provides a period of protection of six months during which termination cannot be sought. Thus, after the representation wishes of employees have been ascertained (whether through joining the bargaining agent or through a representation vote) the bargaining agent is afforded a six month grace period in which to try to establish a stable bargaining relationship. In the construction industry this period of protection afforded by the Act is only six months, as compared to the longer twelve month period for non-construction bargaining relationships (see *Gagnon, supra*). This difference reflects the transient and constantly changing nature of the work force and the labour relations environment in the construction industry, and the Legislature's acknowledgement that a shorter protected period is accordingly appropriate. But again, the period of protection is only six months when employees have been given an opportunity to demonstrate their wishes.

12. To read section 123(2) as suggested by the respondents would create a substantially longer protected period in circumstances where an employer had voluntarily recognized a union, and therefore in circumstances in which the employee wishes had never been tested and in which employees had never been given an opportunity to express their views. The provincial agreement

in question is a two year agreement, and at the time of voluntary recognition, the three hundred and sixty-fifth day of the agreement's operation had already passed. The open period in section 123(2) runs from after the three hundred and fifth day of the operation of the agreement until before the three hundred and sixty-fifth day of its operation. In this circumstance, as the open period contained in section 123(2) has already expired, there will be no open period for any of the employees to apply for termination for the balance of this agreement (accepting the respondents' interpretation). The first open period available to employees (who have never had a chance to express their views with respect to representation by the bargaining agent) would occur after the commencement of the last two months of the subsequent agreement, pursuant to the provisions of section 57(2). In other words, where a voluntary recognition occurs after the three hundred and sixty-fifth day of an agreement's operation, and adopting the respondent's submissions, there would be no open period whatsoever during the balance of the operation of that particular agreement. The first open period would occur only after the commencement of the last two months of the subsequent agreement. The provisions of section 60 would not remedy this deficiency, as section 60 considerations are different than those that apply pursuant to sections 57 or 123, and in any event are available only for one year after voluntary recognition. It makes little sense to read section 123 as providing a protected period (during which a union can establish a bargaining relationship) of only six months after employee wishes have been ascertained, but providing a protected period potentially quite substantially longer when employee wishes have never been tested.

13. We recognize that reading section 123(2) as providing an additional period for applying for termination would in given circumstances afford employees two open periods during the tenure of a particular agreement, the period between three hundred and fifth and the three hundred and sixty-fifth days of the agreement (per section 123(2)) and the period as set out in section 57(2), commencing after the last two months of operation of the agreement. But this scenario exists only when a bargaining agent has been voluntarily recognized and is in the construction industry, two factors which distinguish this situation from the typical non-construction bargaining context, and the Board, in the exercise of its discretion pursuant to section 103(2)(i) of the Act, could bar a second application brought within ten months of a prior unsuccessful termination application. Potential abuse could be dealt with through this mechanism, as it was in *R.L.D. Electric (supra)*.

14. We read section 123(3) as merely incorporating the procedural code set out in subsections three to six of section 57, rather than as an indication that section 123(2) nullifies section 57(2). Section 123(3) establishes that the provisions of 57(3) to (6) remain applicable whether the application is brought pursuant to section 123(2) or section 57(2).

15. Accordingly, and for the above reasons, we find that this application is timely as it has been brought during the open period set out in section 57(2) of the Act. This section is not overridden by the provisions of section 123(2) of the Act; rather, when voluntary recognition occurs in the construction industry, there are potentially available two open periods during which termination applications can be brought.

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[Balance of decision omitted: Editor]

2000-87-R International Union of Operating Engineers, Local 793, Applicant v. Pry-Con Construction Inc., Respondent v. Labourers' International Union of North America, Local 493, Intervener

Certification - Construction Industry - Practice and Procedure - Termination - Timeliness - Voluntary Recognition - Respondent and intervener raising bar of voluntary recognition agreement in their pleadings - Neither appearing at Board hearing - Certification application treated as termination application under s.60 - Board declaring that intervener not entitled to represent the employees in the unit at the time the voluntary recognition agreement was entered into - Certificates issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Jack J. Slaughter* and *Richard Kennedy* for the applicant; no one appearing for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; July 7, 1988

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*. The respondent, in its reply and the intervener, in its intervention asserted that the application was untimely since the employees for whom the applicant seeks bargaining rights were already subject to a voluntary recognition agreement between the respondent and the intervener that was entered into in September 1987.

2. By letter dated June 29, 1988, the solicitors for the intervener withdrew their intervention in this matter. When the hearing convened before the Board on July 5, 1988, no one appeared on behalf of either the respondent or the intervener, and no one on behalf of the respondent or intervener appeared at any time prior to the Board's completion of its hearing at approximately 10:20 a.m. on that day.

3. Counsel for the applicant submitted that the Board should consider this application for certification as being timely and treat this application as also being an application under section 60 of the *Labour Relations Act*. The Board may treat this application for certification as also being an application for a declaration under section 60 where the facts alleged in the pleadings which must be established to determine this application for certification also give rise to a claim for a declaration under section 60. See *T.R.S. Food Services Limited*, [1980] OLRB Rep. March 360 at 361; and generally *Genaire Ltd.*, [1958] O.R. 637, 14 D.L.R. (2d) 201; aff'd (1958) 18 D.L.R. (2d) 588.

4. Section 60 of that Act provides:

"(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.”

5. If the Board treated this as an application under section 60 the Board would declare that the intervener was not entitled to represent the employees for whom the applicant seeks bargaining rights at the time the respondent and intervener entered into the voluntary recognition agreement by reason of section 60(3). The Board raised a concern with counsel with respect to the effective date of such a declaration in view of subsection 4 of section 60. Counsel referred the Board to *T.R.S. Food Services Limited, supra*, where the Board in that case dealt directly with the effect of a declaration made under section 60 in the context of an application for certification. The Board wrote at pages 363-364:

“Counsel for the intervener argued that a declaration under section 52 [now section 60] of the Act does not have a retroactive effect. Instead, in counsel’s submission, the declaration only operates to cancel the agreement from the time of the declaration forward. Pursuant to this reasoning, counsel contends that because the voluntary recognition was in existence at the time the application for certification was filed, it would operate as a bar to the applicant’s application for certification, notwithstanding the Board’s declaration that it is null and void.

If that argument obtains, section 52 of the Act becomes unduly technical and cumbersome to apply. It would only bifurcate proceedings to first require a union to launch a separate section 52 application to clear the way for a later application for certification. More importantly, it is contrary to common sense to suggest that if the intervener was not entitled to represent the employees when the recognition agreement was entered into that the agreement could still be raised as a bar to an application for certification by another union. Furthermore, such an interpretation is neither dictated by the words of section 52 nor in keeping with the Board’s jurisprudence. In the *Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada*, [1978] OLRB Rep. April 362, the Board, following its declaration that the union was not entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into, stated that the alleged collective agreement never was a collective agreement and emphasized the inherent difficulties of attempting to secure a collective agreement in the construction industry by means of voluntary recognition. In *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, the Board determines at page 830 of its decision that the applicant was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into. The Board affirmed that the agreement could not bar the intervener’s application.

A careful reading of section 5(3) indicates that the bar raised against an application for certification by a voluntary recognition agreement is predicated on the Board not having made a declaration under section 52. In this instance the applicant’s application for certification has been deemed by this Board to be an application under section 52 of the Act. The Board has considered the representations of the parties and has declared pursuant to section 52 that the intervener at the time it entered the voluntary recognition agreement with the employer was not entitled to represent the employees in the bargaining unit. Accordingly, the Board further declared that the intervener forthwith ceased to represent the employees in the bargaining unit defined in the recognition agreement. Because the Board has made a declaration under section 52, the clear wording of section 5(3) stipulates that the bar that would otherwise be imposed by section 5(3) in the face of the recognition agreement does not apply.

In view of our determination that the recognition agreement does not bar the applicant’s application for certification the Board now turns to consider the competing applications for certification by the applicant and intervener.”

6. In the absence of any evidence as to the circumstances of the entering into of the voluntary recognition agreement, the Board finds, pursuant to section 60 of the Act, that the intervener was not entitled to represent the employees in the bargaining unit defined in the voluntary recognition agreement between it and the respondent at the time the agreement was entered into and hereby so declares.

7. In view of the Board's declaration, the Board finds that this application for certification is timely.

8. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) and section 117 of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers. The Board further finds that this is an application for certification within the meaning of section 119 and is an application which relates to the industrial, commercial and institutional sector of the construction industry.

9. In view of the representations made to the Board by counsel for the applicant, and based on the material filed, the Board is satisfied that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building and the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 13, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 8 above in respect of all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman.

12. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant

trade union in respect of all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry excluding the industrial, commercial and institutional sector within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building and the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.

0694-87-U Reinaldo Santos, Complainant v. Hotel Employees and Restaurant Employees Union Local 75, Respondent v. Peel County Feed Co. Inc., Intervener

Duty of Fair Representation - Unfair Labour Practice - Complaint that union had failed to process a grievance - Union had been displaced at time of Board hearing - Whether fair representation duty applying to a union which has been decertified with respect to matters arising prior to but not resolved by the time of decertification - Board finding that union not subject to duty after decertification - No breach prior to decertification - Complaint dismissed

BEFORE: *Patricia Hughes*, Vice-Chair.

APPEARANCES: *Reinaldo Santos* and *Cristina Santos* for the complainant; *B. Rutherford* for the respondent; *Robert Dunn* and *John Shelly* for the intervener.

DECISION OF THE BOARD; July 13, 1988

1. The style of cause is hereby amended to add "Peel County Feed Co. Inc." ("the Peel County Feed Co." or "the employer" or "the restaurant") as intervener.

2. Mr. Reinaldo Santos, the complainant in this matter, is a member of the door staff, specifically a captain, at the Peel County Feed Co. restaurant, located near the Pearson International Airport. The respondent herein, the Hotel Employees, Restaurant Employees Union, Local 75 ("the union" or "Local 75"), was the bargaining agent for the employees at the restaurant until June 12, 1987, when the Canadian Textile and Chemical Union ("the CTCU") was certified as the bargaining agent of the employees, at which time Local 75 was decertified ("the decertification"). The arrangement at the restaurant during the relevant time period was that the serving staff paid the door staff 15% of the gratuities they themselves were given by customers. In his complaints Mr. Santos claims that the union failed to process a grievance which he requested be filed alleging that he had not been receiving the 15% gratuity and that the union representative, Mr. Brinsy Nickie, failed to make himself available to him, contrary to the duty imposed on the union by section 68 of the *Labour Relations Act* ("the Act"). Because the matter had not been finally dealt with by the time Local 75 was decertified, this case raises the following issue: does the duty imposed on trade unions by section 68 of the Act apply to a union which has been decertified with respect to matters arising prior to but not resolved by the time of decertification?

3. The complaint is dated May 23, 1987, and was sent by registered mail and therefore filed with the Board on June 5, 1987. Mr. Santos requested that the matter be adjourned on June 26, 1987, and it was adjourned *sine die* for a period not exceeding one year by decision dated July 3, 1987. Mr. Santos wrote to the Board by letter dated January 26, 1988, requesting that the matter be put on for hearing and that was done.

4. The CTCU was not named as a respondent by Mr. Santos; a representative of the CTCU attended at the first day of hearing, however.

5. At the beginning of the second day of hearing, Mr. Santos requested leave to amend his complaint to allege that the union did not follow the grievance procedure set out in the collective agreement because it failed to allow "grieving employees" to sign the grievance report, "forging" Mr. Santos' signature on a grievance report dated March 9, 1987 ("the grievance"), and failing to present the same grievance to the employer. Neither the union nor the employer objected to that request and I permitted the amendment. I am satisfied that Mr. Santos did not know prior to the first day of hearing that Mr. Nickie had written his (Mr. Santos') name on the grievance in the place marked for "Signature of Employee". Mr. Santos' original complaint was that the union did not process his grievance and therefore the failure of the union to give the employer a copy of the grievance dated March 9, 1987, appears to be a variant of that. As for the refusal to allow other employees to sign the grievance report, Mr. Santos testified to that effect on the first day of hearing and could have particularized that allegation in his complaint. In any case, there was no evidence adduced by any other employees that they had actually attempted to sign the grievance but were refused by the union. During the hearing it became evident that Mr. Santos disagrees generally with the manner in which the union handled his concern, not only with respect to the failure to file a grievance, but also with respect to the union's decision to treat his lack of gratuity as intertwined with a requirement, discussed below, that the door staff offer reasonable assistance to the serving staff.

6. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

7. Mr. Santos began to complain to the union in 1985 about not receiving his proper gratuity; he filed a complaint with the Board in 1986 which was withdrawn as a result of a settlement dated October 9, 1986. The settlement states as follows:

1. The Respondent [Local 75] and Interested Party [Peel County Feed Co.] agree to monitor the tipping practices as agreed to in Appendix A of the Collective Agreement currently in effect between them, particularly that practice made reference to in the Letter of Understanding attached thereto and dated Sept. 7th 1983.

In the event said practice is not adhered to the parties to the Collective Agreement will endeavour to develop a system whereby the full 15% of gratuities will be paid to the captains and maitre "d"s [sic] as referred to therein.

8. Appendix "A" to the collective agreement, dated September 7, 1983, states in part that the restaurant and the union "agree that the practice[] in effect at the time of the entering into of the Memorandum of Agreement between the parties dated the 19th day of August, 1981 with respect to ... gratuities ... shall be continued during the life of the Collective Agreement".

9. Also attached to the collective agreement and dated the same day, is a "Letter of Understanding" which is reproduced in full below:

LETTER OF UNDERSTANDING

(To clarify Appendix "A" of the Collective Agreement and the Teplitsky Award dated the 31st day of August 1983)

The parties agree that:

- (1) The practice referred to in Appendix "A" of the collective agreement with respect to "gratuities" is deemed to mean that 15% of all gratuities belongs to and is the property of the door. The "door" includes hostesses, maitre d's, assistant maitre d's and captains. Such practice shall be followed.
- (2) The door will participate in providing reasonable assistance to the waiters.
- (3) In the event of unresolved dispute as to whether the door is providing the reasonable assistance referred to in paragraph (2) hereof, Martin Teplitsky shall be the sole arbitrator.
- (4) The sole arbitrator shall have no jurisdiction to interfere with the provision for gratuities set out in paragraph (1) hereof but shall have jurisdiction to determine whether or not the door has provided reasonable assistance.

10. I did not see the Memorandum of Agreement dated August 19, 1981, but it is clear that the practice referred to there comprised the payment of the 15% gratuity to the "door" referred to at para. 2 of this decision. Nor did I see a copy of "the Teplitsky Award" dated August 31, 1983. There seems doubt that it ever existed, at least as a written award; neither the union nor the employer seems to have a copy and according to the testimony of Mr. George Pineo, the secretary and business manager of Local 75 since 1977, neither Mr. Teplitsky's office nor the Office of Arbitration possesses a copy. Nevertheless, the elusive or illusive award of August 31, 1983, gave rise to the description in the Letter of Understanding of the practice referred to in Appendix "A" of the collective agreement.

11. This Letter of Understanding has now been replaced by a new letter of understanding; there is, in fact, a whole new scheme in place, involving deduction of the gratuity at source, negotiated by the CTCU and the restaurant after the certification of the CTCU. Although there were apparently some retroactive adjustments made for the captains, they did not cover the relevant period of Mr. Santos' complaint.

12. The problem of the waiters and waitresses' not paying the 15% to the door staff is a longstanding one, not only at the Peel County Feed Co., but, I was informed, in the industry as a whole. Sometime around October, 1986, the problem assumed a new "wrinkle": the waiters and waitresses stopped paying the gratuity by "teams" and started giving gratuities which had been collected by one individual. In response to *this* change, Mr. John Shelly, then the General Manager of the restaurant, posted a memorandum directing that "[t]he past practice of the individual teams giving to the 'door' is to be enacted again immediately" and reminding the waiters and waitresses that "the gratuity to the door is to be 15% of all gratuities". That memorandum was dated October 8, 1986, a day or two prior to the signing of the settlement of Mr. Santos' first section 68 complaint. Subsequently, Mr. Shelly posted a second notice dated October 31, 1986, with the same direction as the first one and a reminder of the amount of gratuity. In addition, this second memorandum warned the waiters and waitresses that should they not return to the past practice based on teams, "other alternatives will be taken to resolve this matter". Finally, a notice dated December 3, 1986, was posted setting out the alternative: deduction by the employer of the gratuity at source. The alternative was not implemented, however, because the serving staff chose to return to the payment of the gratuity by teams. In between, a notice dated November 24, 1986, over Mr. Nickie's name, was posted, stating that "the provision in the collective agreement must be adhered to, especially in regards to gratuities and the payment of the door" and that union members failing to comply "may be disciplined by the Management".

13. Mr. Shelly testified that after the December memorandum and a meeting with the staff,

the gratuities were properly given to the door for about six weeks and then the waiters and waitresses “started acting up again”. He then talked to the captains and servers separately and informally.

14. On March 9, 1987, he, Mr. Nickie and Mr. Santos had a meeting to deal with Mr. Santos’ concerns. Mr. Shelly understood that the purpose of the meeting was to discuss the contents of what *would* be a grievance. It was agreed, he said, that “Mr. Santos’ displeasure with the 15% would go to arbitration” and that putting it before Martin Teplitsky, pursuant to the Letter of Understanding, was “the best way to deal with the matter”. (Mr. Santos says he did not attend a meeting on March 9th but agrees he was at a meeting with Mr. Shelly and Mr. Nickie at which only he, Mr. Santos, talked. I am satisfied that this is the meeting referred to by Mr. Shelly.) Subsequently, Mr. Pineo wrote to Mr. Teplitsky on April 21, 1987, asking him “to convene a meeting with Peel County Feed Co. and Local 75 to adjudicate [sic] a dispute with one of our members Reinaldo Santos, the Company and other Union Members with regard to your award of August 31st, 1983”. Apparently, Mr. Teplitsky never responded to Mr. Pineo’s request and shortly afterwards, the union was decertified and Local 75 took no further action.

15. I deal first with the failure to file a grievance with the employer. There is no doubt that the grievance was not filed with the employer. Mr. Shelly testified he had never seen the grievance (until the first day of hearing). Mr. Nickie admits he did not give it to Mr. Shelly. On the day he wrote the grievance, March 9th, there was a meeting already scheduled with Mr. Shelly. At that meeting, the employer agreed to refer the matter to Mr. Teplitsky. It was, therefore, not necessary to file a grievance with the employer. The failure to follow the grievance procedure as set out in the collective agreement prior to referring to arbitration (see article 11:04 of the Collective Agreement between the union and the employer) does not apply in this case where the employer and the union agreed that the issue needed resolution and agreed on the manner of resolution. For that reason, I do not find a violation of section 68 in failing to file the grievance. Filing it would be a technicality which would, I find, achieve no different result than the decision by both the union and the employer to refer the matter to Mr. Teplitsky.

16. But there is another reason why failure to file a grievance would not constitute a section 68 violation in this case. Mr. Santos had difficulty understanding the circumstances under which employees sign grievances. Mr. Nickie originally suggested filing a policy grievance since this was apparently a general problem. Mr. Santos wanted all the captains with complaints to sign it, but a policy grievance is a union, rather than an individual, grievance, and is not signed by employees. After a dispute over this point, Mr. Nickie tore up the policy grievance (which by then he had decided would be inappropriate since there was only one employee grieving [see article 13:01 of the collective agreement]) and wrote up an individual grievance, the March 9th grievance. Mr. Santos refused to sign it and did not even read it. He did not see it again until the first day of hearing when it showed his name in the space provided for the “Signature of the Employee”.

17. The next (and related) issue is Mr. Nickie’s signing of Mr. Santos’ name to the grievance. Mr. Nickie explained that he thought a grievance should be put in, despite Mr. Santos’ refusal to sign, and therefore he signed Mr. Santos’ name to it on March 10, 1988, after the March 9th meeting with Mr. Shelly at which it was decided to refer the complaint to Mr. Teplitsky. Mr. Nickie’s signing Mr. Santos’ name on the grievance report gives me a great deal of concern. I do not believe him when he says he did not think anyone looking at the document would think Mr. Santos signed it. He said it never crossed his mind. It was suggested to me by the union’s representative, that Mr. Nickie signed Mr. Santos’ signature to achieve the desirable or “admirable” end of sending the matter on its way to Mr. Teplitsky. That leaves me to wonder what Mr. Nickie would do to achieve what I am sure he would consider another desirable end: the dismissal of this com-

plaint against the union. Nevertheless, I am not convinced that signing a signature of another person constitutes a contravention of section 68 unless it somehow has an effect upon the relations between the employer and the employee or in some way denies the employee “rights” or “opportunities” he or she would otherwise have.

18. With respect to the effect on relations between the employer and Mr. Santos, Mr. Shelly knew that the focus or the catalyst for the referral was Mr. Santos’ complaint. Mr. Shelly believed, without seeing the grievance, but after discussions with Mr. Nickie, that Mr. Santos’ concern and the issue of reasonable assistance were interrelated. That is also the implication in the way the grievance and the letter to Mr. Teplitsky are worded. But, although Mr. Santos does not consider the two issues interrelated, he did not complain about the way in which the grievance was worded after he saw it at the hearing. Even if Mr. Shelly had seen the grievance, he would not have been misled by about the way in which the grievance was phrased, even though Mr. Santos had not actually signed it. Mr. Shelly believed Mr. Santos was doing his job as captain, but was still prepared to proceed under the Letter of Understanding because he understood that in some way the issues of the payment and assistance were intertwined. Thus Mr. Nickie’s misrepresentation, disturbing though it might be in assessing his credibility and his perception of his role as a union representative, did not affect Mr. Santos’ relationship with the employer. And since Mr. Santos has not complained about the way in which the grievance was worded, but only about the failure to give it to Mr. Shelly, it cannot be said Mr. Nickie’s signing the grievance deprived him of any opportunity or right he would otherwise have had, since, in my view, the same course of referral would have been followed regardless of whether the grievance was signed by Mr. Santos or by Mr. Nickie.

19. I turn next to the decision to respond to Mr. Santos’ concern as a matter coming within the terms of the Letter of Reference. Mr. Santos argues that it was not appropriate to refer the grievance to Mr. Teplitsky because he, Mr. Teplitsky, would not have jurisdiction to deal with it and the decision to so refer it breaches section 68. The employer and the union both thought the way to deal with the matter was to get the problem (as they saw it) of the reasonable assistance settled, even though there was no formal complaint or grievance filed about it. Mr. Shelly testified that in his view the only way to resolve Mr. Santos’ complaint was to determine if he had been providing reasonable assistance. Mr. Nickie also testified that his understanding of the system is that if reasonable assistance is given, then the captain would be eligible for the 15%. Mr. Pineo also treated the matter as an interrelated issue.

20. On the other hand, the memoranda posted by Mr. Shelly and by Mr. Nickie all seem to treat the question of the payment of gratuities as a distinct issue, despite the subsequent position taken by both those individuals. In my view, the Letter of Understanding does so, as well. It is not at all clear from the wording and structure of the Letter of Understanding that the requirement that the door provide “reasonable assistance” to the waiters was part of the practice referred to in Appendix “A”. More particularly, it is not clear that the provision of the 15% *depends* on the provision of reasonable assistance. The Letter of Understanding states that the gratuities practice, defined strictly as the payment of 15%, which is described as “belong[ing] to and [as] the *property* of the door” (emphasis added), “shall” be followed. In addition, and separately, it states there is a reasonable assistance requirement. Should there be a dispute about whether there has been reasonable assistance, the matter can be referred to Mr. Teplitsky who can decide *only* that issue. The arbitrator cannot “interfere” with the provision for gratuities set out in the first paragraph. The Letter of Understanding does not contemplate proportionate gratuities for specific levels of assistance. Nor does it seem that the waiters have the authority to decide to reduce the gratuity because they think the assistance has not been reasonable.

21. Regardless of my own view of the matter, however, the approach chosen by the union, and agreed to by the employer, in itself would constitute a breach of section 68 only if it were followed for one of the reasons set out in section 68, for example, if it were followed *because* that would delay appropriate treatment of the grievance or would distort the treatment of the grievance. After careful consideration, although I think Mr. Pineo was rather careless initially in reading the Letter of Understanding (he admitted that he had not paid attention to the fourth paragraph), I am not satisfied the union recklessly or without sufficient thought or with any ulterior motive took this route and did not therefore breach section 68 by deciding to do so. I add, too, that had Mr. Teplitsky dealt with the matter, he might have determined whether and how the two issues related to each other.

22. The next issue is whether there was adequate communication between Mr. Santos and Mr. Nickie. Mr. Nickie told Mr. Santos that he was going to recommend to the union's Executive Board that the matter should be referred to Mr. Teplitsky and followed that up with a letter dated March 19, 1987, to Mr. Santos which stated that he was recommending the grievance "be taken to Arbitration under the terms of the Collective Agreement, as spelled out in appendix [sic] A". Mr. Santos was not sent a copy of this letter or a letter advising him of the actual referral. Mr. Nickie says he told Mr. Santos the referral had been approved by the Executive Board; Mr. Santos said he did not know about it until the first day of hearing.

23. I accept that Mr. Nickie informed Mr. Santos of the letter to Mr. Teplitsky, although perhaps not in as clear terms as he might have. Nevertheless, I have considered whether a failure to inform Mr. Santos that a letter had been sent to Mr. Teplitsky would constitute a contravention of section 68. I conclude that it would not. Mr. Santos already knew that was how the union proposed to deal with the matter. Even if Mr. Santos had seen a copy of the letter, and even if he had expressed disagreement with it (and given that he did not do so at the hearing when he did see it, and did not object to the proposed manner of dealing with the matter set out in the March 19th letter to him from Mr. Nickie, I cannot find that he would have), it would not change what I have found to be the case: that the union decided, after consideration, that this was the proper way to proceed. Accordingly, I conclude that in the circumstances of this case there would have been no contravention of section 68 even if Mr. Nickie had not told Mr. Santos that his complaint was in fact being handled the way in which Mr. Nickie had advised him he recommended it would be.

24. Accordingly, I find that up to the time of the decertification, the union through Mr. Nickie, while, in my view, not necessarily acting in the most desirable manner, did not contravene section 68.

25. After the union was decertified, it simply stopped dealing with Mr. Santos. Given my conclusion with respect to whether there is a continuing duty under section 68, I do not need to consider whether the evidence of the union's conduct after decertification constitutes a failure to satisfy the section 68 duty of representation and do not do so.

26. Section 68 imposes a duty on a union not to act in certain ways "so long as it continues to be entitled to represent employees". The plain wording suggests that once the union is no longer entitled to represent the employees, it is no longer subject to the duty. Section 56 of the Act declares one circumstance under which a union ceases to represent employees:

56.-(1) If the trade union that applies for certification under subsection 5(4), (5) or (6) is certified as bargaining agent for any of the employees in the bargaining unit defined in the collective agreement, the trade union that was or is a party to the agreement, as the case may be, forthwith ceases to represent the employees in the bargaining unit determined in the certificate and the agreement ceases to operate in so far as it affects such employees.

27. Subsection 56(1), as the Board in *Sunnybrook Foods Limited*, [1985] OLRB Rep. Feb. 337, at para. 13, said,

[m]erely (but importantly) formalizes the displacement where the certification is granted. That is, without section 56(1) there would be two bargaining agents representing the employees in the same bargaining unit. Likewise, since the successful applicant concluded a collective agreement, there would be two such collective agreements operating in respect of the employees in the same bargaining unit. Section 56(1), then, avoids this chaotic situation by terminating the bargaining rights of the incumbent trade union that is or was a party to the agreement and rendering the agreement itself inoperative.

The Board in that case was dealing with alleged violation of section 79 of the Act. It found that the certification of a new union did not leave the employees in a worse position with respect to the freeze than prior to the successful outcome because “[t]he Board is not prepared to reach such a result absent express language in the statute”.

28. In the case before me, once the CTCU was certified as the bargaining agent for the employees in the bargaining unit to which Mr. Santos belonged, Local 75 ceased to represent them pursuant to subsection 56(1). Local 75 no longer continued to be entitled to represent those employees within the meaning of subsection 56(1).

29. I return to section 68 of the Act. Do the words “as long as it continues to be entitled to represent employees in a bargaining unit” contemplate a *continuing* duty which arose prior to the decertification? Clearly there would be no duty on a union to deal with any new matters, arising after the decertification (indeed, the union would presumably be precluded from dealing with new matters). Here, however, the “grievance” and the referral occurred prior to the decertification and Mr. Santos’ original complaint deals entirely with a period prior to the decertification; however, since the matter had not been resolved by June 12, 1987, the issue of whether the grievance had been dealt with appropriately also remained outstanding. When the union dealt with this matter initially, it was under an obligation to represent Mr. Santos according to the requirements of section 68. Can an obligation on the union to complete that which it started be found in section 68? For example, should the union have pressed Mr. Teplitsky further to convene a meeting?

30. There are considerations on both sides of this question. A union such as Local 75 which has just been displaced by the majority of employees may perhaps be excused for wondering why it should continue to expend money and energy on behalf of employees it no longer represents. But, on the other hand, we can ask hypothetically whether a union which has abandoned its bargaining rights should be able to desert the employees with impunity with respect to representation matters undertaken before the abandonment? An employee who has relied on the union to try to remedy what he or she believes to be a violation of the collective agreement by his or her employer, may also ask why the matter is suddenly abandoned, most likely without any recourse. Furthermore, it is not at all clear what either the duty or the right of a “new” union might be in this context (in which the “new” union is not a successor within the meaning of section 62 of the Act), nor is that a question I am asked to decide in this case. One must also ask what remedy might be granted to a successful section 68 complainant against a union which no longer has any rights with respect to an employer and therefore cannot compel an employer to negotiate or settle a grievance. In this regard, if there were an extended duty, the union’s limited capacity to act might be a factor taken into consideration in determining whether the duty has been satisfied.

31. These and other factors show that from a policy point of view an argument can be made for a continuing duty, as well as one against a continuing duty. But the words “so long as it continues to be entitled to represent employees in a bargaining unit” constitute, I conclude, an unambiguous message from the Legislature that the duty on the union under section 68 of the Act ceases

at the time it is decertified. This interpretation is reinforced by subsection 56(1) of the Act. Any employees who relied on the union to deal with conflicts with their employer - as they are required by the Act to do - are, quite simply, "out of luck". Had the Legislature intended otherwise, it could have omitted the phrase "so long as it continues to be entitled to represent employees in a bargaining unit" or added a qualifying phrase to ensure the union has an obligation to complete what it began. It chose to do neither, but rather to establish an arbitrary cessation of the duty, albeit at a logical point in the union's representation history.

32. I conclude that I have no discretion, given the plain wording of section 68, to find the duty on Local 75 extends past the decertification. That conclusion would not be altered, I should make clear, even if it were subsequently determined that a new union had neither an obligation nor a right to represent employees on matters arising before but not concluded by the time of its certification. In that event, employees who had indicated they still wanted union representation, but had simply changed the identity of their bargaining agent, as well as those employees whose union's bargaining rights have been terminated without replacement by another union, would have no recourse with respect to any matters not concluded at the time of the transition, subject only to an employer's and new union's willingness to deal with unresolved matters informally.

33. Accordingly, since I find that Local 75 did not breach the Act prior to decertification and since there is no duty under section 68 on Local 75 after it was decertified, this complaint is dismissed.

0186-84-JD Spruce Falls Power and Paper Company Limited, and Kimberly-Clark of Canada Limited, Complainants v. International Brotherhood of Electrical Workers, Local 1149 and Local 89, Canadian Paperworkers Union, Respondents

Jurisdictional Dispute - Manufacturer of newsprint assigning work in connection with the repair and maintenance of new computer technology to instrument mechanic members of the C.P.U. rather than maintenance electricians of the I.B.E.W. - Board considering a variety of criteria in the exercise of its discretion - Board directing that work shall continue to be assigned to the C.P.U.

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *R. Montague* and *W. H. Wightman*.

APPEARANCES: *G. F. Luborsky*, *D. R. Richard* and *M. Batty* for the complainants; *S. B. D. Wahl*, *G. Ryan*, *K. Van Rassel*, *William Moore*, *M. Micallef* and *J. King* for the International Brotherhood of Electrical Workers, Local 1149; *G. Nyman*, *W. Dubinsky*, *P. Pellow*, *R. Pellow*, *L. Wood* and *B. Casson* for Local 89, Canadian Paperworkers Union.

DECISION OF THE BOARD; July 20, 1988

1. This is a complaint which has been filed pursuant to section 91 of the *Labour Relations Act*. The complaint concerns a dispute between the International Brotherhood of Electrical Workers, Local 1149 ("Local 1149") and Local 89, Canadian Paperworkers Union ("Local 89"). The dispute arose as a result of a decision by the complainants to assign to members of Local 89 certain work in connection with the repair and maintenance of new computer technology known as the "Moore Mycro Stock Proportioning System" ("Moore system") which was installed on the complainants' premises towards the end of 1982. The work in dispute was assigned by the complain-

ants to instrument mechanics who are represented by Local 89. Local 1149 filed a grievance dated August 24, 1983. The hearing of this grievance was adjourned *sine die* on consent in order to allow the parties to refer this matter to the Board. The instant complaint was filed by the complainants on April 18, 1984. The matter came on for hearing before a differently constituted panel of the Board. During the course of the hearing, one of the members of the panel became indisposed and when the parties were unable to agree upon a proper constitution of the panel after the indisposition, the Board terminated the proceedings and directed the parties to begin the complaint again before a differently constituted panel of the Board. The present panel of the Board was assigned to this complaint and hearings commenced on May 20, 1986 and concluded on April 5, 1988. In all, the hearing of the evidence and argument on this complaint by the present panel consumed some 45 days in Toronto and Kapuskasing.

2. In order to understand the facts of this complaint, it is helpful to briefly refer to the background of the complainants' business. The complainants are manufacturers of newsprint in the Town of Kapuskasing. The operations of the complainants are totally integrated. The complainants harvest trees in their Woodlands operations and move them to their mill. The complainants generate their own hydro-electric power at their Smokey Falls Hydro Electric plant and transmit the power by means of high voltage transmission lines to their mill in Kapuskasing. The power is distributed and used throughout the mill. The complainants are what may be referred to as a highly unionized operation. In their Woodlands operations there are approximately 450 unionized employees. Within the mill, approximately 200 employees are represented by Local 256, Canadian Paperworkers Union. These employees operate the papermaking machines located throughout the mill. Local 1149 represents maintenance and construction electricians and electrical operators who work not only in the mill but also at the complainants' Smokey Falls generating station. Local 89 represents all other employees engaged in production at the mill and all other trades groups which include machinists, welders, blacksmiths, millwrights, pipefitters, carpenters, masons, painters, tin-smiths and instrument mechanics. A local of the Office and Professional Employees International Union represents approximately 100 office workers, while a Foremen's Association represents approximately 50 foremen. Local 1149's bargaining unit varies between 77 and 85 employees and Local 89's bargaining unit is somewhere between 800 and 900 employees. This complaint concerns a jurisdictional dispute over work between the instrument mechanics represented by Local 89 and the maintenance electricians represented by Local 1149.

3. The complainants have operated a mill in Kapuskasing since the early years of the century. The concern of the complainants over the years have been to optimize their product in terms of quantity and quality. This, in turn, has meant constantly improving and innovating in its processes which produce pulp and paper. In order to optimize their product, the complainants have been concerned with the concept of process control. Process control is the control of various physical and chemical variables which are monitored and varied in order to maintain quality and quantity and also to intentionally vary the type of product to be manufactured on any given machine during any particular period of time.

4. The complainants called as witnesses Michael Batty, Thomas McElhanney, Robert McCartney and Robert Holmes. Local 89 called as witnesses Peter Pellow and Robert Pellow. Local 1149 called as witnesses Garry Ryan, Kenneth Van Rassel, Karl Lurz and Michael Micallef. Mr. Batty has a degree in mechanical engineering and has been employed with the complainants since 1965. He has held a variety of senior positions, including, manager of engineering, maintenance and construction (between 1982 and 1984), paper mill superintendent (from 1984 til 1985) and manager of newsprint and mechanical pulp, commencing in July of 1985. As manager of engineering, maintenance and construction, he was responsible for the activities of the mechanical, electrical and trades groups, which included responsibility for instrument mechanics and mainte-

nance electricians. Mr. Batty participated in the planning for and the implementation of the Moore system and had input into the decision by the complainants to assign maintenance and repair work on the Moore system to instrument mechanics. Mr. McElhanney was a forester by training and commenced full-time employment with the complainants in 1949. Between 1956 and 1962, he was the labour relations supervisor for the complainants' Woodlands operations. After 1962 he spent four years as the superintendent of industrial relations at the Kimberly-Clark St. Catharines mill. In addition, between 1966 and 1969, Mr. McElhanney was the manager of industrial relations at Kimberly-Clark's offices in Toronto. He returned to the complainants' operations in Kapuskasing in 1969 as the director of industrial relations and held that post until his retirement in 1984. As the director of industrial relations for the complainants, Mr. McElhanney was responsible for overall labour relations, negotiations with trade unions as well as the administration of collective agreements, including benefit and salary provisions. Mr. McCartney commenced employment with the complainants in 1946 as a railway brake man. In 1950, he became a helper in the welding shop and was transferred in 1951 to the instrument shop as a junior tradesman. Mr. McCartney completed what was then a two-year apprenticeship programme and became an instrument mechanic in 1953. He held this position until 1967, when he became the relief head instrument mechanic for approximately three and a half years. He was then promoted to the position of head instrument mechanic and occupied that post for five years. In 1975, Mr. McCartney became the instrument foreman, which is a position outside the bargaining unit he previously belonged to, and he occupied this position until January of 1982, when he spent a period of one year as the assistant maintenance superintendent. Between December of 1982 and March of 1983, Mr. McCartney again held the position of instrument foreman and was then permanently promoted to the position of assistant maintenance superintendent at the mill. Mr. McCartney had, in terms of the witnesses before the Board, an unmatched experience and knowledge of the skill and training of instrument mechanics. In terms of continuity and depth of knowledge, Mr. McCartney's evidence was of great assistance to the Board. Robert Holmes commenced employment with the complainants in 1946 as an electrician. In that position he was a member of Local 1149 and held the position of vice-president of that Local in the late 1950's. In 1969, he was promoted to the position of electrical foreman. He held that position until 1975, when he became the sawmill superintendent for one year and was subsequently promoted to the position of electrical superintendent in 1977. Mr. Holmes held this position until his retirement in June of 1986. In his capacity as electrical superintendent, Mr. Holmes was responsible for supervising all of the maintenance electricians. He has also had considerable experience in the education of electricians. During his earlier years of employment with the complainants, he was a union representative on the Trades Training Committee which was responsible for establishing and monitoring the training of electricians' apprentices at the mill. In 1984, he was appointed to the Provincial Advisory Board which considered the qualifications and training of electricians. He also held a position on the Board of Directors of Northern College. As electrical superintendent he had input into the decision to assign maintenance and repair work on the Moore system to instrument mechanics. Peter Pellow commenced his employment with the complainants in 1965 as a millwright helper. Some six months later he successfully applied for a position in the instrument shop. After successfully passing a mechanical aptitude test, he commenced his training as an apprentice instrument mechanic and completed the training in November of 1969. Thereafter, Mr. Pellow worked as an instrument mechanic for the complainants with the exception of a two-month period in 1971 and 1972. In 1980, he was promoted to the position of head tradesman and relief foreman of the instrument shop. During his employment with the complainants, he was a member of Local 89's Trades Training Committee between 1979 and 1985. This Committee had responsibility for designing courses and monitoring the progress of apprentices employed at the mill. The next witness, Robert Pellow, was unique in terms of the perspective he was able to give to the Board. Mr. Pellow had been both an electrician and was currently an instrument mechanic in the employ of the complainants. He commenced employment with the complainants in 1965 as a spare oiler at the Smokey Falls generating station. He progressed through a series of jobs at the

generating station to the position of oiler and then operator. During that time, he was a member of Local 1149 and he was therefore governed by the collective agreement between the complainants and Local 1149. In 1969, Mr. Pellow transferred from the Smokey Falls generating station to the mill electrical department as an electrical helper in construction and maintenance. At that point, he became an apprentice electrician and commenced a course of study and training of some three years' duration in order to become an electrician at the mill. He received his certificate of apprenticeship and a provincially-issued certificate in electronics in 1971. In 1973, Mr. Pellow left the employment of the complainants and returned in the following year as a millwright helper, which was and is within the bargaining unit of Local 89. After a period of time on the millwright crew, Mr. Pellow transferred to the instrument shop in May of 1976, as an apprentice instrument mechanic. He was given one year's credit towards the completion of the four year apprenticeship programme for instrument mechanic because of his previous experience as an electrician. Upon completing his apprenticeship, Mr. Pellow was employed as an instrument mechanic and has been so employed since 1979. Garry Ryan began his employment with the complainants in 1956, and held a variety of positions within the bargaining unit of Local 89. He became a member of Local 1149 when he was transferred to the filter plant. He commenced his training as an electrical apprentice in 1961. He completed the training in 1964, and held positions as electrical maintenance helper, relief shift electrician, field construction electrician and shift electrician. He became a maintenance electrician in 1977 and has continued in that position up to the time of the giving of his evidence. With regard to participation in the activities of Local 1149, Mr. Ryan has held elected positions with the Executive, including recording secretary from 1970 to 1975, vice-president from 1975 to 1981, and president from 1981 to 1987. As a member of the Executive, he has participated in negotiations for collective agreements with the complainants on behalf of Local 1149 in 1973, 1975, 1978, 1980, 1982 and 1984. Kenneth Van Rassel became regularly employed with the complainants in May of 1965, as a timekeeper for field construction crews. At that time he was within the bargaining unit of the Office and Professional Employees International Union. Later on in 1965, he transferred to the field construction electrical department as a helper and began his apprenticeship training. He completed the training in 1969 and he received a 309D certificate from the Ministry of Labour. This meant that he was qualified as an electrician in construction and maintenance work. Karl Lurz at the time of his testimony had been employed by the complainants for more than 19 years. His present position was that of electrician. Michael Micallef was employed by the complainants as an electrician. While he started in the electrical department in March of 1975, he did not start his apprenticeship until May of 1976. He completed his three years of training and became qualified as an electrician in the mill.

5. The Board has carefully reviewed the evidence and has considered the questions asked and the answers given. The Board notes the tendency from time to time of counsel to ask compound questions which consist of more than one question. The Board has considered the questions in context and the variations in testimony between the evidence given during examination-in-chief and the answers supplied in cross-examination. The Board does not propose to go into the evidence in great detail. Much of the evidence was extremely technical and other aspects of the evidence were often repetitive. The witnesses who gave evidence on behalf of the complainants and Local 89, gave their testimony to the best of their recollection and in the view of the Board they were reliable witnesses. Their credibility and their recall of events was not significantly shaken on cross-examination. Of the witnesses called by Local 1149, the evidence of Mr. Lurz and Mr. Micallef added very little to the evidence which was given by Mr. Ryan and Mr. Van Rassel. Mr. Ryan was examined at length in cross-examination. It appeared to the Board that he resented having to respond to the searching questions which were put in cross-examination. In addition, both Mr. Ryan and Mr. Van Rassel were frequently not responsive to the questions which were put to them in cross-examination. In reviewing the lengthy written submissions which were requested and received by the Board, it is noted that Local 1149 based its principal arguments upon its cross-ex-

amination of the witnesses who were called by the complainants and Local 89 and upon the examination in-chief of the witnesses which were called by Local 1149. The Board, of course, must consider both the examination in-chief, the cross-examination and the re-examination of all of the witnesses who testified before it. When there is a conflict in a testimony between the witnesses called by the complainants and Local 89 on the one hand and the witnesses called by Local 1149 on the other hand, the Board has accepted the evidence given by the former witnesses in preference to the evidence given by the latter witnesses.

6. It appears on the evidence that commencing in the early years of the operation of the mill, process control was probably effected largely, if not exclusively, by means of the use of pneumatic or hydraulic equipment. It also appears that during the same period of time electrical equipment was inspected and maintained by the maintenance electricians. However, commencing in the 1950's, the complainants began to introduce into its mill electrical equipment for the purpose of process control. It is clear that the inspection and maintenance of this equipment had been assigned to instrument mechanics. This evolutionary development is confirmed by the evidence of Mr. McCartney who stated that in the 1950's and 1960's, he analyzed the situation on the basis of the number of man-hours as well as the number of instruments being as follows:

Pneumatic 84%
Hydraulic less than 1%
Electric 5%
Electronic 10%

The evolutionary nature of the changes in the types of instrumentation caused the complainants to issue and publish guidelines with respect to a definition and application of the concept of process control instruments. These guidelines were issued in February of 1958, and were issued again in February of 1964. These guidelines confirmed and reconfirmed the understanding of the complainants and Locals 1149 and 89 of the distinction between process control and motor control in the mill. Although it may not be said that these guidelines were clearly accepted by Local 1149, they were nevertheless adhered to by the parties to this complaint over the years that followed up to an including the time of the filing of this complaint. The guidelines read as follows:

INSTALLATION, INSPECTION AND MAINTENANCE OF PROCESS CONTROL INSTRUMENTS

1. Definition - Process Instrument

A device which performs by any means any combination of the following functions in connection with a process variable: measures, indicates, warns, records, controls. Typical process variables are pressure, level, temperature, pH, electrical conductivity, density, consistency, etc. The definition of a process instrument would include two or more of the following parts:

- a) measuring means - detects process variable.
- b) indicating means - displays information on the value of the measured variable.
- c) error detecting means - measures difference between the measured variable and some desired value of the measured variable.
- d) controller mechanism - provides an output signal which is some predetermined function of the error.
- e) final control element - controls the flow of energy or material to the process in response to the controller output signal.

The definition of process instrument also includes the following:

Small 2-way and multi-port valves commonly used to provide directional control of pneumatic and hydraulic power, where these valves are mechanically operated.

The definition of process instrument does *not* include the following:

Those instruments which measure, indicate, warn, record, control purely electrical variables. Typical electrical variables would be voltage, current, power, frequency, etc.

Those instruments used to measure speed which receive their signal from any electrical device. Such instruments and devices are the responsibility of the Electrical group.

Those photoelectric devices which provide a switching action on interruption of a light source.

2. Scope of Instrument Mechanic Responsibility

The Instrument Mechanics will be responsible for the installation, inspection and maintenance of all process instruments as defined above with the following qualifications:

Installation:

- a) The Instrument Mechanics will rely on other trades to install the primary measuring element where a connection into a process vessel or pipe line must be made. Such installations should be audited by the Instrument Mechanic.
- b) Where two or more Instruments are required to be connected by electrical wiring, such wiring will be performed by the Electricians.
- c) Where two or more Instruments are required to be connected by piping or tubing such piping or tubing will be performed by the pipefitters except where the instruments are contained within a panel or other enclosure. Piping inside such an enclosure or panel will be performed by the Instrument Mechanics.
- d) Installation of the secondary elements described under section 1, b) c) & d) above where such instruments are to be mounted individually or installations of a panel containing one or more of such instruments will be made by other trades. Installation of these instruments within or on a panel will be made by the Instrument Mechanics.
- e) Installation of the final control element described in Section 1, e) above will be made by other trades.

Inspection & Maintenance:

- a) Inspection and maintenance of primary measuring elements are the responsibility of the Instrument Mechanics. They will rely on other trades for assistance as required for removal and repair.
- b) Inspection and maintenance of all secondary elements as described in Section 1, b) c) & d) above, will be the complete responsibility of the Instrument Mechanics.
- c) Inspection and maintenance of all Final Control Elements as described in Section 1, e) above, will be shared by the Instrument Mechanics and the other trades. The Instrument Mechanics will be responsible for that portion of the Final Control Element which receives the actuating signal and positions a mechanical link up to the point where this link joins the rest of the Final Control

Element. Viz: In a control valve this would include the valve operator and upper stem but not that portion of the valve below the packing. In a variable resistor this would include again the operator but not the resistor portion or subsequent electrical devices. In a metering pump this would include the operator which adjusts the pump stroke but not the pump.

The proper operation of the final control element of course requires that the whole device responds correctly to the actuating signal and usually the maintenance on such equipment will require one or more trades to work together to accomplish this end.

- d) Inspection and maintenance of solenoid valves will be shared by the Instrument Mechanics, Electricians and Pipefitters. Electricians will be responsible for the valve coils. Instrument Mechanics will be responsible for solenoid valve bodies 1/2 inch and under in size. Pipefitters will be responsible for solenoid valve bodies in sizes over 1/2 inch.

7. The Board proposes to very briefly review the relevant events which unfolded since the middle of the 1960's. At the beginning of this time frame instrument mechanics were assigned by the complainants to repair and maintain a Data Logger, Tracer Lab and pneumatic "computers". The evidence supports a finding that the Data Logger and Tracer Lab are digitally-based computers. By 1968, the maintenance of certain components of the Robert Morse Magna Printer in the shipping area of the mill was assigned to electricians under service contracts. Most of the troubleshooting of errors and faults in the computer were done by electronic technicians who are not included in the bargaining unit represented by Local 1149. By the beginning of 1970, the maintenance electricians represented by Local 1149 became increasingly opposed to the state of affairs with respect to work on computers. It had long been an ideal of the electricians in the mill to have jurisdiction over "anything with a wire attached to it". This led to a work stoppage on January 29, 1970 over the assignment of work in the mill in accordance with the guidelines of 1958. In the months of February and March of 1970, the complainants, Local 1149 and Local 89 met and endeavoured to write a mutually satisfactory agreement on new guidelines. The meetings proved to be fruitless and in March of 1970, the complainants reaffirmed the guidelines of 1958. At that time, Local 1149 did not file a grievance with respect to the conduct of the complainants. In 1971, the Robert Morse Magna Printer was replaced by the Herco Automatic Label Printing ("Herco") system. The maintenance on certain components of this system was assigned to electricians. In addition, there was also a service contract with respect to the Herco system. The evidence supports a finding that the Herco system is a multi-control system.

8. The Board now considers the chronology with respect to collective bargaining and the collective agreements between the complainants and the respondents. There was a joint collective agreement between the complainants, Local 1149, Local 89 and Local 256, Canadian Paperworkers Union. This agreement expired in 1973. In April of 1973, the joint bargaining between the complainants and these three locals concluded with separate collective agreements for each of the respondents. During that round of bargaining, Local 1149 endeavoured to secure a provision in the collective agreement for exclusive jurisdiction over computer systems. Local 1149 also endeavoured to secure a provision in the collective agreement that the line of demarcation between its jurisdiction and the jurisdiction of other trade unions in the mill should be in accordance with established jurisdictional lines. In September of 1973, the complainants and Local 1149 concluded a collective agreement effective May 1, 1973 until April 30, 1975. Local 1149 had been unsuccessful in its request for exclusive jurisdiction over computer systems. However, the collective agreement did contain for the first time a provision in the recognition clause language which stated "in accordance with existing jurisdictional lines". Two years later, in 1975, Local 1149 submitted a bargaining proposal to the complainants which contained a request for jurisdiction over computer systems in accordance with existing jurisdictional lines. Local 1149 was unsuccessful in securing such lan-

guage. In a further collective agreement between the complainants and Local 1149, which was effective from May 1, 1975, to April 30, 1978, the recognition clause was expanded to include power and telephone wiring. However, there was no change in the language with respect to "in accordance with existing jurisdictional lines". During 1978, the complainants installed an M.D.D.C. system in its finishing room office. This system was used by product planners and was serviced under a service contract. It was not serviced or maintained by the complainants' electricians. In April of 1978, Local 1149 again unsuccessfully requested in a proposed collective agreement jurisdiction over computer systems in accordance with existing jurisdictional lines. In September of that year, a new collective agreement between the complainants and Local 1149 was entered into effective May 1, 1978 to April 30, 1980. During 1979, the complainants installed an Atmospheric Services Incorporated Equipment (ASI digital equipment) in its sawmill in connection with certain chip'n'saw machinery. Some of the service work in connection with this equipment was performed by the complainants' electricians and the repair and maintenance of the equipment was covered by a service contract. The evidence established that it was generally the practice of the complainants when installing its new systems to have the equipment covered by a service contract. The system in this equipment consisted of a series of electronic relays, latching relays and solenoids. Mr. Batty in his evidence described this system as motor control. In April of 1980, it was again bargaining time and Local 1149 submitted a bargaining proposal which requested jurisdiction over computer systems in accordance with existing jurisdictional lines. Local 1149 was unsuccessful in this regard. A new collective agreement was effective from May 1, 1980 to April 30, 1982. While there were no changes in the recognition clause of the collective agreement, Local 1149 achieved a measure of satisfaction in that the memorandum of agreement provided that discussions regarding the maintenance of computers could be initiated by either the complainants or Local 1149 at any time as the need arose.

9. For some years prior to 1981, the complainants had used a mechanical stock proportioning system known as the Trimbey system. In May of that year, the complainants proposed to replace this system with the Moore system. The instrumentation on the Trimbey system had been serviced and maintained by instrument mechanics represented by Local 89. Between September of 1981 and September of 1982, the complainants held a series of separate and joint meetings with the respondents with a view to discussing and resolving jurisdiction over computer work in the mill. The Board does not propose to review the intricacies and the various versions of what did and did not happen during that year. Suffice it to say, the Board will state its findings in this matter. Concurrently with these meetings, collective bargaining was again proceeding during 1982. By September of 1982, the complainants had prepared a letter of intent in which the work on each computer system was assigned on the basis of whether its prime function was process control or motor control. This had the effect of assigning the Moore system to instrument mechanics represented by Local 89. The complainants, Local 1149 and Local 89 executed this letter of intent. The letter of intent reads as follows:

LETTER OF INTENT
BETWEEN
LOCAL 1149 OF THE I.B.E.W.
LOCAL 89 OF THE C.P.U.
AND
THE COMPANY

RE: ADVISORY COMMITTEE ON COMPUTER CONTROL SYSTEMS

A six-person Advisory Committee comprised of two representatives from each of Local 1149, Local 89 and the Company, will be formed to investigate and advise on the installation and maintenance of computer control systems with particular emphasis on areas where jurisdictional responsibilities may be obscure.

It is further understood that primary jurisdiction of each installation of computer controls will be assigned after meaningful consultation with the Advisory Committee according to existing jurisdictional lines. The functional action of the equipment (i.e. where the equipment is primarily motor control or process control) will be the normal basis of assignment. This assignment, however, may not exclude allocating joint responsibility for work in one computer system.

In September of 1982, Local 1149 and Local 89 each concluded collective agreements with the complainants which were in effect from May 1, 1982 to April 30, 1984. In October and December of 1982, and again in May of 1983, the Advisory Committee on Computer Control Systems met to no avail and no result was reached on an agreement under the Committee. During the late summer and early autumn of 1982, the Moore system, which was essentially pre-wired, was installed by the complainants' electricians under the supervision of a representative of the manufacturer Moore Instruments Ltd. of Brampton, Ontario. As was previously mentioned, on August 24, 1983, Local 1149 filed a grievance regarding the assignment of work on the Moore system to instrument mechanics represented by Local 89. On April 18, 1984, the complainants filed the instant complaint under section 91 of the Act. It appeared that the complainants and Local 1149 intended to proceed to arbitration with respect to the grievance filed in August of 1983. However, there is no evidence before the Board that Local 1149 ever commenced a proceeding under either its earlier collective agreements or under the provisions of the *Labour Relations Act* with respect to any assignment of work by the complainants.

10. The complainants made a distinction between process control and motor control. It is fair to say that generally speaking, with the exception of pieces of equipment like the Modicon PLC computer system, Local 89's views on the distinction between process control and motor control coincided with the views of the complainants on this subject. Local 1149, on the other hand, as the result of years of being unable to claim what it believed to be rightfully its work jurisdiction, from time to time before the Board referred to the distinction between motor control and process control as being that process control was anything the complainants said it was. As the Board understands the evidence, and there was a great deal of evidence on this point, there is a distinction which may be made between process control and motor control. On the basis of all the evidence before it, including the exhaustive description of the various types of systems which were assigned on the basis of the function performed, particularly by Mr. McCartney, there emerges a consistent and objective definition for process control and motor control. The Board now sets forth its findings with respect to what constitutes motor control and what constitutes process control. With respect to motor control, there are two types. There is stop/start and variable speed. In the case of stop/start motor control, the circuitry is either closed in which case the motor is switched on

and is running at a constant speed, or, alternatively, when the circuitry is broken, the motor is off. With variable speed motor control, the speed of the motor may be varied to meet a desired set point. In this case the variables measured, recorded, and controlled are electrical variables such as current, voltage, power and frequency.

11. Process control involves the controlling of a chemical or physical process. The concept of process control may be considered in the context of the complainants' operations. The production of paper involves various chemical and physical processes. A process may be controlled by controlling the chemical or physical constituents of a process. Those constituents identify themselves in the form of measurable chemical or physical properties. These measurable chemical or physical properties vary from time to time in the process. However, by controlling these measurable properties, control of the process is achieved. In the context of the complainants' operations, common measurable production variables include acidity/alkalinity (pH), colour, consistency, density, flow, level, temperature, pressure, electrical conductivity and thickness/weight. By controlling these variables, control may be exerted over the process. In controlling the process, quantity and quality of the final product having the properties desired by the complainants and its customers are maximized. Clearly, certain means are necessary in order to achieve control of the process. Firstly, the variables must be measured. Accordingly, there must be a measuring element and a means to indicate the measured value of the variable. Secondly, there must be a means of ascertaining whether the measured value of the variable is reflective of the value necessary to produce the interim or final product. Thirdly, there must be a mechanism to control the value of the variable in the event that the value of the variable as measured deviates from the value of the variable required to produce the desired product. Fourthly, there must exist a means to achieve a change in the value of the variable if its value as measured deviates from the required value or beyond the range of desired values. Such functions may be performed manually and initially were performed manually at the mill. However, in the complainants' high technology mill such functions are performed by the use of various types of equipment. Equipment used to perform these functions when linked constitutes what is known as a control loop. In a complex control loop in order to maximize control and ensure effective, efficient monitoring and prompt restoration of a process which has been experiencing problems, additional equipment may be used in the control loop. Additional equipment may, for example, be used to record the present value of a variable over a period of time and equipment may be added to record variations, both present and past, of the desired values and deviations from desired values in a permanent form such as on a strip graph. In the 1958 guidelines, the complainants defined process control and defined various components in a control loop. As was stated earlier, the guidelines defined the components of a control loop to consist of a measuring means, an indicating means, error detecting means, controller mechanism and a final control element. The guidelines assigned to instrument mechanics, the responsibility for the maintenance and inspection of all components associated with process control regardless of whether these components were linked in a control loop. With respect to the measuring means and the final control element, although responsibility for inspection and maintenance was assigned to instrument mechanics, under these guidelines the instrument mechanics were to "rely on other trades for assistance as required for removal and repair". For example, the removal and re-installation of a valve or a pipe might require the services of a millwright or a pipefitter. The same was not true in the case of an indicating means, the error detecting means and the controller mechanism. The inspection and maintenance of these components were described in the guidelines as the complete responsibility of the instrument mechanic. The reality is that process control and process control loops have a massive presence at the mill. It was the evidence of Peter Pellow that there were 2,963 process control loops in the complainants' operations in Kapuskasing. As instrument mechanics assumed the responsibility for process control loops that were assigned to them by the complainants, blueprints for these loops were and are maintained in separate files in the shop used by the instrument mechanics.

12. The complainants, on their interpretation of the guidelines, made certain assignments of work with respect to the computers in the mill. The Robert Morse Magna Printer system was installed by electricians in accordance with the guidelines and was partially serviced and maintained by electricians with a service contract. This system is primarily a motor control system. Pneumatic computers were assigned to the instrument mechanics, again in accordance with the guidelines. The Tracer Lab and Data Logger systems are digitally-based computer systems and are process control systems and were assigned with respect to repair and maintenance to instrument mechanics, again in accordance with the guidelines. When the Herco system replaced the Robert Morse Magna Printing system it was assigned to the electricians because the system is a motor control system. With respect to the Trimbey system, the instrumentation was serviced and maintained by instrument mechanics. When, in 1982, the Moore system replaced the Trimbey system, the complainants assigned the work on the Moore system in accordance with the traditional guidelines. The evidence established that the Moore system consists of ninety-two per cent process control and eight per cent motor control. However, the electrical motors have no feedback to the computer. The computer controls of the Moore system, that is to say, the cathode ray tube, the keyboard, the printer, the satellite station, the process control interface cabinets, the low level link, the high level link and the microprocessors constitute recording, monitoring and control instrumentation for process control loops involved in stock proportioning. The main function of the computer controls of the Moore system is process control. Accordingly, as stated before, the prime responsibility for the Moore system was assigned to instrument mechanics represented by Local 89 in accordance with the guidelines of 1958.

13. The A.S.I. digital system in the sawmill, the MDDC system in the finishing room and the Modicon PLC system in the chip loft were assigned to the electricians on the basis that they were primarily motor control systems. The assignment of these four systems was popularly referred to during the hearings as the three for one assignment, with the Moore system being assigned with respect to primary responsibility to the instrument mechanics and the other three systems being assigned to the electricians. The Board finds that, in fact, the complainants made such an assignment which was accepted by Local 89 and Local 1149.

14. The Board's jurisprudence with respect to the exercise of its discretion under section 91 has also followed an evolutionary process in setting forth relevant criteria. Criteria were set forth in the first complaint filed with the Board following the amendment to the Act in 1966, which gave the Board jurisdiction to entertain jurisdictional disputes. See: *Canada Millwrights Limited*, [1967] OLRB Rep. May 195. The tentative criteria set forth in that case were narrowed in *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528, when the Board considered collective bargaining relationships, skill and training, economic considerations, employer practice and area practice. Subsequently, the Board in *Boise Cascade Canada Ltd.*, [1979] OLRB Rep. Sept. 850 and in *Southam Murray Printing*, [1984] OLRB Rep. June 868, adopted a broader set of criteria in order to resolve jurisdictional disputes. A variety of criteria is considered by the Board in the exercise of its discretion under section 91. The criteria which the Board finds useful in the instant complaint are: employer preference, employer practice, area or industry practice, collective bargaining relationships, skill and training and considerations of economy and efficiency. The Board notes that, on agreement, the parties did not call any evidence with respect to area or industry practice.

15. With respect to the criterion of employer preference, the complainants have clearly and unequivocally assigned the work in this jurisdictional dispute to instrument mechanics represented by Local 89. It was the position of Local 1149 that the criterion of employer preference ought to have no bearing on the Board's deliberations in this complaint. Local 1149 referred the Board to the case of *J.R. Seguin et Fils Limitee*, which is an unreported decision of the Board in File No. 1718-76-JD, decision dated June 28, 1977. In that decision Local 1149 referred to a passage

wherein the Board stated that employer preference was not to be given weight where the project in dispute was the first installation of its type undertaken by the employer. The Board does not agree with the assertion by Local 1149 that the preference exercised by the complainants in this case reflects a first or initial assignment. The evidence clearly establishes that prior to 1982, the complainants had installed digitally-based computer systems which effected the process control in the form of the Data Logger and the Tracer Lab. Therefore, in our opinion, the preference of the complainants in this case in awarding the work in dispute to instrument mechanics represented by Local 89 is not the first or initial assignment in this regard made by the complainants. The criterion of employer preference therefore favours the assigning of the work to instrument mechanics represented by Local 89.

16. With respect to the criterion of employer practice, it has been the complainants' practice to assign work similar to the work in dispute to instrument mechanics represented by Local 89. The Moore system is a process control computer system and the functions performed by the computer components in the system are quite clearly functions in the nature of process control. The components of the Moore system function simultaneously as a controller, an error detecting means and an indicating means within the meaning, scope and application of the guidelines first set forth in 1958. The practice of the complainants in this regard is illustrative of the fact that the recording, monitoring and controlling instrumentation in the Trimbe system is now being performed by the Moore system. The instrument mechanics repaired and maintained the Trimbe stock proportioning system and were responsible for troubleshooting that system. The instrument mechanics are quite clearly continuing the practice of the complainants in this matter. This criterion therefore also favours the assigning of the work to instrument mechanics represented by Local 89.

17. With respect to the criterion of collective bargaining relationships, the Board notes that both Local 1149 and Local 89 have and have had collective agreements with the complainants over a period of many years. It should be noted, however, that unlike the collective agreement between the complainants and Local 89, the collective agreement between the complainants and Local 1149 contains language and a jurisdictional provision which qualifies work assignments to "in accordance with existing jurisdictional lines". In each round of bargaining for a new collective agreement since 1973, Local 1149 has endeavoured to gain jurisdiction over computer systems in accordance with existing jurisdictional lines. However, these endeavours have not been successful. In our view, the words "in accordance with existing jurisdictional lines" is clearly understood by the parties to be a reference to the guidelines of 1958 where there is a demarcation between the work of instrument mechanics and maintenance electricians. The Board finds that the assignment of work which has been made by the complainants is in accordance with the provisions of the collective agreements to which they are bound. The criterion of collective bargaining relationships therefore supports an assignment of the work to instrument mechanics represented by Local 89.

18. The criterion of skill and training is obviously a critical matter in terms of the operation of the complainants' mill. Clearly, if a class or group of employees is unable to perform work to the satisfaction of the complainants, then it is only to be expected that the complainants will assign particular work to the class or group of employees in whom it has confidence that the work will be well performed. The evidence before the Board establishes that instrument mechanics, by reason of their acquired skills and ongoing training, have developed the abilities which are necessary in order to effectively carry out work in the field of process control in the mill. A knowledge of process control is essential to the requirements of troubleshooting the Moore system. Electricians do not receive training in process control. Indeed, it was the evidence of Mr. Lurz that he had no knowledge of process control. A verification of this statement by Mr. Lurz is to be found in the evidence of Robert Pellow. It will be recalled that Mr. Pellow qualified as an electrician with a certificate of qualification and then decided that he would qualify as an instrument mechanic. It is the

undisputed evidence before the Board that he required an additional two years of training in apprenticeship as an instrument mechanic before he could perform with the necessary skill and ability required in an instrument mechanic to troubleshoot process control in the mill. While electricians represented by Local 1149 clearly possess certain skills and abilities, it is quite clear that those skills and abilities do not equip them to work in the area of process control in the mill. This criterion therefore supports the assignment of the work to instrument mechanics represented by Local 89.

19. With respect to the criterion of considerations of economy and efficiency, the Board refers to a decision in *F.D.V. Construction Limited*, which is an unreported decision of the Board in File No. 2084-81-JD, dated October 29, 1982. In that decision, the Board indicated that with respect to considerations of economy and efficiency such considerations must be weighed in the broader context of an employer's operations. That approach is particularly applicable to the facts of this complaint. It appears to the Board that the broader context of the complainants' operations require the efficient and economical operation of its production of paper and that, as a necessary and vital part of this consideration, the location and elimination of unacceptable variations and breakdowns in the manufacturing system have to be not only carefully monitored, but tracked down and eliminated as quickly as possible. The evidence clearly establishes that instrument mechanics are competent to accurately and expeditiously troubleshoot the process control matters in the complainants' mill. On the evidence before it, the Board is satisfied that a division of responsibility between instrument mechanics and electricians in the troubleshooting of process control would cause a lowering of the economy and efficiency presently expected and enjoyed by the complainants in their mill with respect to the manufacture of paper. It appears also to the Board that the problems related by Peter Pellow with respect to the Measurex system would occur in the event of a division of responsibility for troubleshooting between instrument mechanics and electricians. It will be remembered that Mr. Pellow testified that there had been conflicts and delays caused by the split in jurisdiction between instrument mechanics employed by the complainants and employees of the Measurex system who were under a service contract with respect to that system. Throughout the evidence heard by the Board there was a constant theme which underlined much of the testimony given by the witnesses who were called by the complainants and Local 89 that a split in jurisdiction would be wasteful and deleterious to the complainants' operations. On the basis of the evidence before it, the Board does not disagree with that assessment. The criterion of considerations of economy and efficiency therefore favours the assignment of the work to the instrument mechanics represented by Local 89.

20. The criteria which have been referred to by the Board clearly and overwhelmingly favour an assignment of the work in dispute to instrument mechanics represented by Local 89. The performance of process control work by instrument mechanics in the complainants' mill has evolved over a period of three decades. Instrument mechanics have acquired by training and experience a record of troubleshooting process control systems which has been satisfactory to the complainants. The approach of Local 1149 to the work in dispute seeks to ignore three decades of work and experience in the complainants' mill. The assignment of the work in dispute to instrument mechanics represented by Local 89 has led to a situation where electricians represented by Local 1149 are not able to undertake by reason of their training and experience.

21. Having regard to the foregoing, the Board issues a direction pursuant to section 91(1) of the *Labour Relations Act* that the work in dispute shall continue to be assigned to Local 89, Canadian Paperworkers Union. Accordingly, the Board directs, pursuant to section 91(1) of the *Labour Relations Act*, that Spruce Falls Power and Paper Company Limited and Kimberly-Clark of Canada Limited shall continue to assign to Local 89, Canadian Paperworkers Union:

- I primary responsibility for the Moore Mycro Stock Proportioning System; and
 - II all work in connection with the repair and maintenance of the computer components of the Moore Mycro Stock Proportioning System, including and without limitation of the generality of the foregoing, the cathode ray tubes, printers, keyboards, computers, disc drives, high and low level data links, and all other equipment located in the Process Control Interface cabinets no. 1 and 2, the satellite and operator consoles; with the exception of
 - III the thirteen "380 cards" located in the Process Control interface cabinet no. 1 on which the motor stop/start relays are mounted.
-

0423-88-U Mechanical Contractors Association of Ontario, Watts and Henderson Ltd., State Contractors Incorporated, Applicants v. Local 46 of The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Sean O’Ryan, Mitch Griffiths and the members of the respondent local trade union employed by Watts and Henderson Ltd., Bill Weatherup, Members of the respondent local trade union employed by State Contractors Incorporated, Respondents

Construction Industry - Strike - On agreement of parties union members ordered to cease and desist from engaging in illegal strike activity including refusals of overtime - Members later refusing overtime on instructions from union - Union attempting to obtain higher hourly rate for its local - Board finding that union calling an unauthorized strike - Breach of s.146(2)

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *Richard J. Charney, Brian Dominique, Jack McCarron and Steve Coleman* for the applicants; *L. C. Arnold and A. J. Ahee* for the respondents.

DECISION OF THE BOARD; July 4, 1988

1. Herein are the Board’s reasons for its decision dated May 18, 1988 with respect to this application for relief under section 135 of the *Labour Relations Act* in which the Board issued certain declarations and directions.

2. By decision dated May 9, 1988 (in Board File No. 0348-88-U), the Board declared that the members of Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada were engaged in an unlawful strike against employers represented by the Mechanical Contractors Association of Ontario, and directed them to “immediately cease and desist from engaging in any unlawful strike activity including work refusals, *refusals of overtime*, slowdowns or by engaging in any other concerted activity designed to limit or restrict output” (emphasis added). That application was withdrawn as against the remaining respondents, including Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting of the United States and Canada (“Local 46”), Sean O’Ryan, Mitch Griffiths and Bill Weatherup, all of whom were also named as respondents to this application.

3. This application was filed on May 13, 1988. In essence, it reiterated the allegations made in the previous application but also alleged that the respondents, pursuant to a common understanding, encouraged, caused, instituted or participated in a concerted refusal to work over-time which, it was alleged, also constituted strike activity contrary to the *Labour Relations Act* and the Board Order of May 9, 1988.

4. By way of preliminary motion, the respondents sought to have this application dismissed without a hearing on the basis that the matters raised in it were already the subject of the Board's May 9, 1988 decision, and, further, that the proper form of rendering a dispute relating to the allegations made by the applicants, including the enforcement of the Board's previous decision, was not the Board. That motion was dismissed because it was patently obvious that the applicants did not seek, in this application, to have the Board enforce its previous decision. Further, that previous decision does not contain any declarations or orders relating to any of the respondents other than those members of Local 46 employed by Watts and Henderson Ltd. and State Contractors Incorporated. Even as against those respondents, the allegations with respect to the alleged over-time ban were new. Consequently, I found the Board's practice of refusing to exercise its discretion to refuse to declare an unlawful strike or to issue a cease and desist order with respect thereto where a work stoppage has ended before the hearing (see for example, *Acoustical Association*, [1975] OLRB Rep. July 539, *Steinberg Inc.*, [1983] OLRB Rep. Feb. 253) to be inapplicable to this application. In that regard, I considered it significant that the entire alleged work stoppage had not stopped, that the application raised issues which could have implications extending beyond the immediate parties (see *Bechtel Canada Ltd.*, [1977] OLRB Rep. May 269, *Tecumseth Insulation Services Ltd.*, [1982] OLRB Rep. May 779), and a deliberate and sustained effort to flout the law was being alleged (see *The Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581).

5. Pursuant to the designation issued by the Minister under section 139(1)(b) of the Act on May 14, 1982, the Mechanical Contractors Association of Ontario ("MCAO") is the employer bargaining agency which represents in bargaining all employers whose employees are represented by the affiliated bargaining agents of the employee bargaining agency (which pursuant to the designation issued by the Minister under section 139(1)(a) of the Act on May 14, 1982 is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada), of which Local 46 is one, in the industrial, commercial and institutional ("ICI") sector of the construction industry in Ontario. Watts and Henderson Ltd. ("Watts") and State Contractors Incorporated ("State") are both represented in bargaining in the ICI sector of the construction industry by the MCAO.

6. The previous provincial agreement between the two bargaining agencies expired on April 30, 1988. By Memorandum of Settlement dated April 30, 1988, another provincial agreement was agreed to, subject to ratification by the bargaining agencies' respective constituencies. Both sides ratified the settlement by May 4, 1988 (which was the earliest date that a lawful strike or lock-out could have commenced). Pursuant to the terms of the settlement (and section 146 of the Act), the provincial agreement was made effective from May 1, 1988 to April 30, 1990. It was in this context that the MCAO found it necessary to bring the application under section 135 in Board File No. 0348-88-U, which was disposed of as aforesaid.

7. Watts has been the Project Manager on an ICI construction project at Fairview Mall in the Municipality of Metropolitan Toronto since July 1987. It has employed members of Local 46 there pursuant to the terms of the applicable provincial agreement throughout. On April 30, 1988 it employed some twenty-five such persons on the site. On May 4, 5, 6, and 9, 1988, all of the

members of Local 46 were scheduled to work but failed to report therefor. It was clear that they did so at the instance of Local 46. After the MCAO obtained the May 9, 1988 Order from the Board as aforesaid, members of Local 46 did report for work on May 10, 1988 and worked a full day, including some overtime. On May 11, 1988, Mitch Griffiths, a business representative of Local 46, informed Watts that, by authority of a Local 46 by-law, Local 46 members would, on the instructions of Local 46, work no more overtime on the Fairview Mall project. In fact, Local 46 members did refuse to work overtime on May 11, 1988 and thereafter, despite being asked to do so. Griffiths did suggest that Local 46's overtime ban might be lifted if Watts would agree to increase the hourly rate being paid to its members on the newly negotiated and ratified provincial agreement by \$1.10.

8. State had, at all material times, two separate ICI projects at the Petro-Can Refinery in Clarkson. The evidence establishes that the fifty-one to fifty-five members of Local 46 which they had employed on the sites at the time failed to report for work as scheduled on May 4, 5, 6 and 9, 1988 and that they did so at the instance of Local 46. They did report for work on May 10th and thereafter, but, at the instance of Local 46, refused to work overtime despite being asked to do so. Bill Weatherup, a Business Representative for Local 46, informed State that there would be no more overtime work at the sites because the union had invoked one of its local by-laws, unless "incentive" payments (amounting to an extra half hour at double time or one hour straight time) were made in addition to the rates being paid pursuant to the provincial agreement. Weatherup also said that if State would pay one dollar above the hourly rate established by the provincial agreement, Local 46 would supply all the men the company needed and that they would work all the overtime necessary.

9. Sean O'Ryan, Business Manager of Local 46, informed State that Local 46 was unhappy with the provincial agreement and that (with respect to the May 4, 5, 6 and 9, 1988 work stoppage) members of Local 46 would return to work if they were paid 50¢ per hour above the rate established in it. Subsequently, at a membership meeting called by Local 46, O'Ryan told the assembled members they had to go back to work, but that overtime was voluntary and only to be done in accordance with Local 46's constitution and by-laws. The effect of this was to bar overtime until Local 46 otherwise directed. He also said that "if we get one dollar more we go back to working overtime".

10. Section 1(1)(o), 135(1), 135(2)(a) and 146 provide that:

1.-(1)

- (o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

135.-(1) Where, on the complaint of an interested person, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

...

(2a) Where, on the complaint of an interested person, trade union, council of trade unions, employers' organization, employee bargaining agency or employer bargaining agency, the Board is satisfied that a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency, bargained for, attempted to bargain for, or concluded any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 146(1), it may direct what action, if any, a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations, or employer bargaining agency, shall do or refrain from doing with respect to the bargaining for, the attempting to bargain for, or the concluding of a collective agreement or other arrangement other than a provincial agreement as contemplated by subsection 146(1).

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

11. In the course of argument, counsel for the respondents requested, for the first time, that the Board reconsider its May 9, 1988 decision, particularly as it relates to the working of overtime. Assuming, without finding, that the respondent's request was, in the circumstances, properly made in the manner it was, counsel did not suggest any cogent reason why reconsideration was appropriate (see Board Practice Note No. 17 which describes circumstances in which the Board might reconsider a decision). Further, the May 9, 1988 decision was based upon an agreement of the parties, which included all of the respondents herein, and which agreement included the precise wording of the declaration in paragraph 1(a), the direction in paragraph 1(b), and the withdrawal of the application insofar as it related to the respondents other than members of Local 46. In the absence of some suggestion of undue influence, and there was none, it does not lie in the mouth of the respondents to request reconsideration of a decision to which they specifically agreed.

12. The respondents' defence to this application was premised upon the existence of a right they asserted Local 46 had to control the working of overtime by its members. In that respect, they relied upon what they assert is a practice which requires employers who employ Local 46 members in the ICI sector to obtain permission, from Local 46, before they could be asked to work overtime. The respondents specifically rely upon Local 46's By-Law No. 4 which provides, in part, as follows:

(6) The regular hours of work shall be those contained in the Agreement applicable to the work being performed, and any hours worked above the regular working hours, or at times other than between the regular starting and stopping times contained in the relevant agreement, shall be deemed to be overtime, and shall be paid for at the premium rates of wages contained in the Agreement, unless there are provisions in the relevant agreement for work being done at times other than during the regular work day. In such cases, the decision to work at times other than during the regular work hours without premium pay should be recorded in the Local Union, and approval obtained from the Business Manager.

Such approval to be recorded in the minutes of the Executive Board meetings as soon as possible after such permission has been given.

(7) The Executive Board may, upon representation by the Business Manager, or upon regular request by the membership of Local Union 46, issue instructions requiring the reporting of all overtime worked and may revoke said instructions at such times as they may deem to be in the best interests of the Local Union.

(8) The Executive Board may, upon submission of a request for same by the Business Manager, or upon the number of journeymen registered as unemployed upon the work books of the Local Union exceeding 100 men or 2 per cent of the total journeymen membership of the Local Union for a period of time exceeding three weeks, or as a matter of policy for the good and welfare of the Local Union, suspend the working of overtime on all but work of an extreme emergency nature, for such period of time as it may deem to be necessary. The Executive Board may also when it is deemed proper to do so, limit the suspension of overtime to any portion of the membership, or any specific work-project. In order, as a policy decision, to invoke all or any part of this section of this By-Law, the Business Manager may request a special meeting of the Executive Board, and the Board must comply with that request within 48 hours. Nothing in this section of this By-Law shall be construed as limiting the power of the Business Manager to suspend overtime on any project between meetings of the Executive Board.

13. The respondents also rely on Article 108 in Appendix 11 (the one applicable to Local 46) to the provincial agreement which provides that:

Article 108 HOURS OF WORK

108.1 The ordinary hours of labour on Monday to Friday inclusive will be from 8:00 a.m. to 4:30 p.m., one hour for lunch. If mutual arrangements can be made in any individual shop, these hours may be changed from 8:00 a.m. to 4:00 p.m. with a half hour for lunch. Subject to the agreement of the Union and management the Contractor may vary the starting and finishing time on any individual job site to a maximum of 8 hours per day in order to provide a scheduled shorter work day.

Although it was not referred to in argument, I note that Article 109 provides that:

Article 109 OVERTIME

109.1 All hours worked on Saturdays and Sundays and the Statutory Holidays listed in Article 6 when worked shall be paid at the rate of Double Time.

109.2 All overtime beyond the normal hours per day shall be paid at the rate of Double Time with the exception of Article 110 - Shift Work and Article 107 - Service and Repair Work.

109.3 On scheduled overtime work, preference where practical shall be given to the employees regularly employed on the project.

14. I was not satisfied that the evidence established that Local 46 possesses any right to control or direct the overtime work by its members who are employed in the ICI sector of the construction industry by employers represented by the MCAO, or that there is any practice to that effect either generally or with respect to Watts or State. Local 46's By-Law No. 4 is no more than an unilateral declaration of internal union policy and procedure. The evidence did not establish that the MCAO, or any of the employers it represents in bargaining, made any representation to Local 46 in that respect, or that any of the respondents relied to their detriment on anything that had been said or done in that respect by the MCAO or any of the employers it represents. Accordingly, assuming (without finding) that the equitable doctrine of estoppel can apply to statutory prohibitions, the estoppel which counsel for the respondents argued made it inappropriate to permit the applicants to rely upon their strict legal rights did not exist. Indeed, the evidence did not establish that any of the applicants were even aware of the relevant provisions of the By-Law. Further,

there was no cogent evidence that Local 46's Executive Board had invoked Article 8 of By-Law 4 (upon which the respondents primarily relied), or that the Business Manager (O'Ryan) had acted either within his powers, thereunder or otherwise.

15. The evidence did establish that overtime under the provincial agreement is voluntary on an *individual* basis. Further, although the provincial agreement does establish the regular hours of work, it does not guarantee either a minimum or maximum number of hours that will be worked in a week. It neither prohibits an employer bound by the agreement from assigning overtime work, nor requires such an employer to obtain the consent of Local 46 before scheduling or assigning overtime work to its members. Indeed, the scheme of the provincial agreement contemplates that overtime will be worked and recognizes the right of employers bound by it to schedule and assign it. At most, Article 108 of Appendix 11 to the provincial agreement establishes the base work week, and accordingly, creates the basis for calculating overtime. It requires only that an employer obtain the agreement of the union before it can vary the *regular* hours of work (see *Harding Carpets Limited*, 56 CLLC 26 1831, *Algoma Steel Corp.*, [1980] 28 LAC 2 31 (Hinnigan)).

16. It is well established that a concerted refusal to withhold overtime constitutes a strike within the meaning of the *Labour Relations Act* and, concomitantly, that if such an overtime ban is imposed in an untimely manner (that is, within the term of a collective agreement or during a "freeze" period), such a strike is unlawful within the meaning of sections 92 and 135 of the *Labour Relations Act* (see for example *Canada Packers Inc.*, [1983] OLRB Rep. Sept. 1405, *C & C Yachts Manufacturing Limited*, [1977] OLRB Rep. July 433, *Domtar Packaging Limited*, [1974] OLRB Rep. Dec. 899). The respondents relied heavily upon the Board's recent decision in *MacMillan-Bathurst Inc.*, [1987] OLRB Rep. Dec. 1568 (application for reconsideration dismissed, [1988] OLRB Rep. March 312). In that case, there was a well-established practice whereby whenever there was a lay-off, those employees not laid off would, pursuant to a local union by-law known to and accepted by the applicant employer, refuse to work overtime for the duration of the lay-off, except with the agreement of the union in emergency situations. The employer had accepted and taken into account this practice for some ten years before applying to the Board for a declaration that such a refusal to work overtime constituted an unlawful strike and for associated relief. Although the Board found that there was an overtime ban and that it had been imposed by the respondents in accordance with a common understanding, it declined to issue any declarations or give any other remedy with respect thereto on the basis that the parties had "... accepted for many years that overtime bans follow lay-offs as a matter of course". *MacMillan-Bathurst Inc.* was distinguishable on the facts. The evidence before the Board in this case did not establish any practice remotely approaching that in *MacMillan-Bathurst Inc.*, or that any of the applicants knew of or accepted the Local 46 by-law upon which the respondents rely, or that, as was the case in *MacMillan-Bathurst Inc.*, they accepted overtime bans. Furthermore, the mere fact that parties have sanctioned, either by specific agreement or by tolerance, a course of conduct in their collective bargaining relationship does not preclude such conduct from being subject to the strike prohibitions in the *Labour Relations Act*. To suggest otherwise would be to permit parties to contract out of the strike prohibitions in the Act, which is not permissible (see, for example, *Toronto Transit Commission*, [1984] OLRB Rep. Dec. 1781). Of course, even if unlawful conduct has occurred, the Board has the discretion, under section 135 (and section 92) of the Act, to determine whether or not it is appropriate, in the circumstances of the case, to issue a declaration or direction with respect thereto. In *MacMillan-Bathurst Inc.*, the Board declined to determine whether an unlawful strike had occurred because it concluded that, in the circumstances of that case, it would not exercise its discretion to issue any declaration or direction with respect thereto in any event.

17. It was abundantly clear that an unlawful strike was ongoing at the time of the hearing before the Board. It was also clear that the respondents did not invoke or participate in the contin-

uing aspect (that is, the overtime ban) of the work stoppage in the hope that this would provide work for fellow union members who were on lay-off, as was the case in *MacMillan-Bathurst Inc.*. Instead, it was a deliberate sustained attempt by the respondents to flout the law, in the face of a Board order to which they had specifically agreed, to obtain an agreement or arrangement “adjusting” the provincial agreement insofar as it applies to Local 46 and its members. This was a breach of section 146(2) of the *Labour Relations Act*. To have declined to grant relief in these circumstances would have been to sanction breaches of the Act.

18. Accordingly, I was satisfied, on the evidence before the Board, that:

- (a) Local 46 called or authorized an unlawful strike;
- (b) O’Ryan, Griffiths, and Weatherup had counselled, procured, supported or encouraged an unlawful strike;
- (c) members of Local 46 employed by Watts and State had been and were, at the time of the hearing, engaged in an unlawful strike;
- (d) Local 46, through its officers (O’Ryan, Griffiths, and Weatherup) had attempted to bargain for a collective agreement or arrangement in the ICI sector of the construction industry in contravention of section 146 of the *Labour Relations Act*.

19. I was not satisfied that, assuming I had the jurisdiction to do so, it was either necessary or appropriate for the Board to give its consent to prosecute the respondents or any of them. In my view, it would not have been in the interest of harmonious labour relations between the parties to do so.

20. Nor was I satisfied that it was necessary or appropriate to direct Local 46 to post any notices as requested by the applicants, particularly when it is open to employers represented by the MCAO to themselves post copies of the Board’s decision, or of the declarations and directions therein, if they wish to do so. Accordingly, it would have served no useful purpose for the Board to direct Local 46 to do so.

21. In addition, I was not satisfied that it was appropriate for the Board to deal with the issue of any damages arising out of the unlawful acts of the respondents in the context of a proceeding under section 135 of the Act. In my view, it is both contemplated by the scheme of the Act (see section 95) and more appropriate that such issues be dealt with at arbitration, if they cannot be otherwise resolved.

22. The declarations and directions made in decision dated May 18, 1988 were made for the foregoing reasons.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1137-87-R; 0995-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Donegan's Haulage Ltd. (Respondent)

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1484-87-R: Public Service Alliance of Canada (Applicant) v. The Heritage Canada Foundation (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except Executive Directors, Directors, Assistant Directors, Deputy Executive Director, Executive Assistant, Accountant, Secretaries to Members of the Management Committee, those above the rank of Assistant Director, all those employed in the Main Street Program, one Liaison Officer, one Accounting Clerk and one Merchandising Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

1681-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. J. R. Carpentry Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

1876-87-R: International Union of Operating Engineers, Local 772 (Applicant) v. Copley, Noyes & Randall Ltd. (Respondent)

Unit: "all employees of the respondent at Hamilton, save and except supervisors, persons above the rank of supervisor, sewing machine mechanics, salaried designers and designers in training, order markers, production control, piece-work ticket office staff, samplers, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 8, 1987" (6 employees in unit) (*Having regard to the agreement of the parties*)

2359-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 99538 Canada Inc., c.o.b. as B.C. Meck (Respondent) v. Ren 2i Pich 2i on his own behalf and on behalf of a group of employees of B.C. Meck (Intervener)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties

of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2992-87-R: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Vesta Cutting Tools Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at St. Catharines, save and except supervisors, persons above the rank of supervisor, technical, office, sales staff and students employed during the school vacation period or in a co-operative training programme” (17 employees in unit) (*Having regard to the agreement of the parties*)

3119-87-R: Canadian Union of Public Employees (Applicant) v. National Action Committee on the Status of Women (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto and the City of Ottawa” (8 employees in unit)

3320-87-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Hamilton-Haldimand Stationers Ltd. & 687458 Ontario Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except managers and persons above the rank of manager” (22 employees in unit) (*Having regard to the agreement of the parties*)

3371-87-R: Ontario Nurses’ Association (Applicant) v. Plainfield Children’s Home (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Thurlow, save and except the director of health services, persons above the rank of director of health services, and persons regularly employed for not more than 24 hours per week” (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

3374-87-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Cedarland Properties Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3445-87-R: Canadian Union of Public Employees (Applicant) v. Glebe Centre Inc. (Respondent)

Unit: “all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, dieticians, watchman/maintenance staff, secretary to the assistant administrator, executive assistant to the administrator, bookkeeper” (110 employees in unit)

(*Having regard to the agreement of the parties*) (*Clarity Note*)

3554-87-R: United Steelworkers of America (Applicant) v. Steel Cylinder Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Tilbury, save and except forepersons, persons above

the rank of foreperson, office, clerical and sales staff” (35 employees in unit) (*Having regard to the agreement of the parties*)

3588-87-R: Ontario Public Service Employees Union (Applicant) v. St. Mary’s General Hospital (Respondent)

Unit: “all office and clerical employees of the respondent in the City of Timmins, save and except supervisors, persons above the rank of supervisor, Secretaries in the Executive Director’s office, Secretary to the Director of Finance, Secretary to the Director of Nursing, and Secretaries to the Director of Human Resources” (88 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

0059-88-R: Hotel Employees, Restaurant Employees Union, Local 75 (Applicant) v. Mr. Greenjeans (Galleria) Corp. (Respondent)

Unit #1: “all employees of the respondent at the Toronto Eaton Centre, Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (77 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (59 employees in unit) (*Having regard to the agreement of the parties*)

0081-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Carr Steel Construction (1987) Ltd. (Respondent)

Unit: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all boilermakers and boilermakers’ apprentices in the employ of the respondent in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0118-88-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses (Chatham-Kent, Ontario Branch) (Respondent) v. Group of Employees (Objectors)

Unit #1: “all registered and graduate nurses employed by the respondent in a nursing capacity at its Chatham Branch, save and except nursing supervisor, persons above the rank of nursing supervisor and persons regularly employed for not more than 24 hours per week” (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

0122-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Murata Erie North America Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Trenton, Ontario, save and except foremen, persons above the rank of foremen, office, sales, engineers and technical staff” (643 employees in unit) (*Having regard to the agreement of the parties*)

0149-88-R: United Food & Commercial Workers, Local 175, Chartered by the United Food & Commercial Workers International Union, CLC:AFL:CIO (Applicant) v. Caressant Care Nursing Home of Canada Ltd. v. Bonnie Brae Nursing Home (Respondent)

Unit #1: “all employees of Caressant Care Nursing Home of Canada, Ltd. operating as a nursing home known as Bonnie Brae Nursing Home at Fergus, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, maintenance personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Caressant Care Nursing Home of Canada, Ltd. operating as a nursing home

known as Bonnie Brae Nursing Home at Fergus, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, maintenance personnel” (10 employees in unit) (*Having regard to the agreement of the parties*)

0150-88-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Railtech Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Applehill, Ontario, save and except forepersons, persons above the rank of foreperson, office and clerical staff, and students employed during the school vacation period” (17 employees in unit) (*Having regard to the agreement of the parties*)

0187-88-R: Canadian Textile & Chemical Union (Applicant) v. Nucleus Housing Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Head Attendants, persons above the rank of Head Attendant and office and clerical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

0197-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Board of Education for the City of Hamilton (Respondent)

Unit: “all employees of the respondent employed as speech pathologists, social workers, psychological consultants and adjustment counsellors, save and except associate superintendent and supervisors, persons above the rank of associate superintendent and supervisor, students employed during the school vacation period and employees in bargaining units for whom any trade union or branch affiliate held bargaining rights as of April 22, 1988” (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

0207-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. West Parry Sound Board of Education (Respondent)

Unit: “all occasional teachers employed by the respondent in the District of Parry Sound, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0245-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Applicant) v. McLeod Bros. Mechanical 746442 Ontario Inc. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0273-88-R: Canadian Union of Public Employees (Applicant) v. Kincardine & District Association For The Mentally Retarded (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Kincardine, Ontario, save and except Manager of Residential Services, persons above the rank of Manager of Residential Services, and office and clerical staff” (27 employees in unit)

0285-88-R: Ontario Nurses’ Association (Applicant) v. Parry Sound District General Hospital (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at its Parry Sound District General Hospital for less than the full normal scheduled hours in Parry Sound, save and except Head

Nurse, persons above the rank of Head Nurse” (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0323-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Herbie’s Drugs Ltd. c.o.b. as Herbie’s Drug Warehouse (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Regional Municipality of Sudbury, save and except cashier supervisors, assistant managers, persons above the rank of assistant manager, pharmacists, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (43 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in the Regional Municipality of Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except cashier supervisors, assistant managers, persons above the rank of assistant manager and pharmacists” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0332-88-R: Graphic Communications International Union, Local N-1 (Applicant) v. Canadian Security Printers Inc. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period” (102 employees in unit) (*Having regard to the agreement of the parties*)

0345-88-R: Ontario Nurses’ Association (Applicant) v. Omni Health Care Ltd. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Riverview Manor in the City of Peterborough, save and except Director of Nursing and persons above the rank of Director of Nursing” (11 employees in unit) (*Having regard to the agreement of the parties*)

0355-88-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. R.V. Campbell Commercial Laundry Services (1985) Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

0366-88-R: Canadian Union of Public Employees (Applicant) v. The Bruce County Board of Education (Respondent)

Unit: “all employees of the respondent in the County of Bruce employed as Education Assistants, save and except supervisors, persons above the rank of supervisor, employees in bargaining units for which any trade union held bargaining rights as of May 6, 1988” (30 employees in unit) (*Having regard to the agreement of the parties*)

0360-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Columbia Lumber Company Ltd. (Respondent)

Unit: “all employees of the respondent at its retail store at 612 Victoria Park Avenue in the Municipality of Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, security staff and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0367-88-R: Canadian Union of Public Employees (Applicant) v. Welland County Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the respondent at its schools in the Regional Municipality of Niagara, save and except

supervisors, persons above the rank of supervisor, teacher aides, child care workers, psychologists, psychometrists, social workers, speech language pathologists, developmental specialists, noon supervisors, students employed in co-operative education programmes, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of May 6, 1988, being the application date" (15 employees in unit) (*Having regard to the agreement of the parties*)

0368-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. McNamara Construction Company (A Division of George Wimpey Canada Ltd.) (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0369-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. McNamara Construction Company (A Division of George Wimpey Canada Ltd.) (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0383-88-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. 724342 Ontario Ltd. (Respondent)

Unit: "all stationary engineers and those persons primarily employed as their helpers employed by the respondent in its Beef Terminal division in the Municipality of Metropolitan Toronto" (4 employees in unit) (*Having regard to the agreement of the parties*)

0386-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rotoplane Inc. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0406-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. The Complx Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (36 employees in unit) (*Having regard to the agreement of the parties*)

0407-88-R: Canadian Union of Public Employees (Applicant) v. V.S. Services Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Vanier at Centre D'Accueil, save and except supervisors and persons above the rank of supervisor" (27 employees in unit) (*Having regard to the agreement of the parties*)

0425-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 397 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance at 91 Muir Drive in the Muni-

pality of Metropolitan Toronto including resident superintendent, save and except property manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

0429-88-R: Ontario Nurses’ Association (Applicant) v. County of Grey (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at its Rockwood Terrace Home for the Aged in the Town of Durham, save and except Supervisor of Nursing and persons above the rank of Supervisor of Nursing” (7 employees in unit) (*Having regard to the agreement of the parties*)

0435-88-R: Service Employees International Union, Local 532 affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Dallov Holdings Ltd. c.o.b. as Maple Villa Nursing Home (Respondent)

Unit: “all employees of the respondent in the City of Burlington, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (36 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0459-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. 732118 Ontario Inc. c.o.b. as Nortown Loeb I.G.A. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Chatham, Ontario, save and except department managers, persons above the rank of department manager, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (78 employees in unit) (*Having regard to the agreement of the parties*)

0478-88-R: United Steelworkers of America (Applicant) v. Hanna Manufacturing Company (Canada) Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Hamilton, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff” (65 employees in unit) (*Having regard to the agreement of the parties*)

0479-88-R: United Steelworkers of America (Applicant) v. The Daily Press, Division of Thompson Newspapers Company Ltd. (Respondent)

Unit: “all Editorial Department employees of the respondent at and out of Timmins, save and except the City Editor and Kapuskasing Bureau Manager, those above the rank of City Editor and Kapuskasing Bureau Manager, office, clerical and sales staff” (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0493-88-R: United Steelworkers of America (Applicant) v. Labour Community Services of Metropolitan Toronto Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director, and employees in bargaining units for which any trade union held bargaining rights as of May 24, 1988” (3 employees in unit) (*Having regard to the agreement of the parties*)

0509-88-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Glo-Ver Merchandising Inc. (Respondent)

Unit: “all employees of the respondent in Dunnville, save and except manager and persons above the rank of manager” (20 employees in unit) (*Having regard to the agreement of the parties*)

0515-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Urbandale Building Corporation Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton

Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

0541-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Culinar Inc. (Respondent)

Unit: “all employees of the respondent at Oshawa, save and except supervisor, those above the rank of supervisor, office and clerical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0551-88-R: United Steelworkers of America (Applicant) v. Kaiser Aluminum & Chemical of Canada Ltd. (Respondent)

Unit: “all employees of the respondent at 54 Carnforth in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

0554-88-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Norwich (Respondent)

Unit: “all office and clerical employees of the respondent in the Township of Norwich, save and except Chief Building Official, Drainage Superintendent, Treasurer, Deputy Clerk, Tax Collector, Municipal Clerk, Clerk-Administrator, Deputy Treasurer, persons above the rank of Chief Building Official, Drainage Superintendent, Treasurer, Deputy Clerk, Tax Collector, Municipal Clerk, Clerk-Administrator, Deputy Treasurer, persons employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining unit for which any trade union held bargaining rights as of May 30, 1988” (6 employees in unit) (*Having regard to the agreement of the parties*)

0556-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Hi Skill Construction Ltd. (Respondent)

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0580-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Borden Boothby & Company Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0581-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Furtado Carpentry Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0582-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Angra Carpentry De Sousa (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0490-87-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Hamilton (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Hamilton, save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" (367 employees in unit)

Number of names of persons on revised voters' list	362
Number of persons who cast ballots	73
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	70
Number of ballots marked against applicant	3

3441-87-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. London & Middlesex County Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in the City of London and the County of Middlesex" (134 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	135
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5

3528-87-R: United Steelworkers of America (Applicant) v. Screen Print Display Advertising Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Brantford, save and except forepersons, persons above the rank of foreperson, office, creative and sales staff, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (147 employees in unit)

Number of names of persons on revised voters' list	129
Number of persons who cast ballots	124
Number of ballots marked in favour of applicant	65
Number of ballots marked in favour of The Employee's Association of Screen Print Display Advertising Limited	59

0017-88-R: International Woodworkers of America (Applicant) v. MacMillan Bloedel Ltd. (Respondent)

Unit: "all employees of the respondent at Nipigon, save and except foremen, supervisors, persons above the rank of foreman or supervisor and office staff" (238 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	138
Number of persons who cast ballots	132
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	130

Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of Canadian Paperworkers Union	45
Number of ballots marked in favour of International Woodworkers of America	85

0304-88-R: Canadian Paperworkers Union (Applicant) v. Atlantic Packaging Products Ltd. (Respondent)

Unit: "all stationary engineers and persons working primarily as their helpers, employed by the respondent in the Municipality of Metropolitan Toronto, save and except Chief Engineer, persons above the rank of Chief Engineer and employees in bargaining units for which CPU and GCIU, L.466 have bargaining rights as of May 2, 1988" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of Canadian Union of Operating Engineers, Local 101	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3065-87-R: Canadian Union of Public Employees (Applicant) v. St. Joseph's Villa (Respondent)

Unit: "all lay employees of St. Joseph's Villa at 56 Governor's Road, Dundas, Ontario, regularly employed for not more than 24 hours per week, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, students dieticians, supervisors, persons above the rank of supervisor, technical personnel, and office staff" (95 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	68
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	66
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	9
Ballots segregated and not counted	2

3371-87-R: Ontario Nurses' Association (Applicant) v. Plainfield Children's Home (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Thurlow regularly employed for not more than 24 hours per week, save and except director of health services and persons above the rank of director of health services" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

3551-87-R: The University of Western Ontario Police Association (Applicant) v. The Board of Governors of The University of Western Ontario (Respondent)

Unit: "all university police officers of the respondent, save and except sergeants, those above the rank of sergeant, office staff, students employed during the school or university vacation period and persons regularly employed for not more than 24 hours per week" (12 employees in unit)

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	9

Number of ballots marked against applicant

0

Applications for Certification Dismissed Without Vote

3337-86-R: Office & Professional Employees International Union (Applicant) v. The Board of Education for the City of Hamilton (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener) v. Group of Employees (Objectors) (189 employees in unit)

1692-87-R: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Super Carnival Food Store Ltd. (Respondent) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Intervener #1) v. Combined Merchandisers Inc. (Intervener #2) v. United Food & Commercial Workers International Union, Local 1000A (Intervener #3) (75 employees in unit)

2383-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Applicant) v. Orocon Inc. (Respondent) (6 employees in unit)

2994-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Romko Excavating Inc. (Respondent) (3 employees in unit)

3375-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Cedarland Properties Ltd. (Respondent) (3 employees in unit)

3553-87-R: Ironworkers District Council of Ontario (Applicant) v. Inline Ltd. (Respondent) (2 employees in unit)

3559-87-R: International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 736 (Applicant) v. Northern Panel Systems - Division of 709694 Ontario Ltd. (Respondent) (4 employees in unit)

0004-88-R: Graphic Communications International Union, Local 500M (Applicant) v. Bayweb Ltd. (Respondent) (98 employees in unit)

0115-88-R: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. McLean Young Construction Ltd. (Respondent) (2 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3515-87-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bronson Bakery Ltd. (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, route drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (49 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	38
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	20

0008-88-R: Canadian Paperworkers Union (Applicant) v. MacMillan Bloedel Ltd. (Respondent)

Unit: "all employees of the respondent at Nipigon, save and except foremen, supervisors, persons above the rank of foreman or supervisor and office staff" (93 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	138
Number of persons who cast ballots	132

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	130
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of Canadian Paperworkers Union	45
Number of ballots marked in favour of International Woodworkers of America	85

Applications for Certification Dismissed Subsequent to Post-Hearing Vote

1379-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. KWS Energy Services Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

3418-87-R: IWA Canada (Applicant) v. South River Planing Co. Ltd. (Respondent)

Unit: "all employees of the respondent at South River, save and except forepersons, persons above the rank of foreperson, office, and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	8

0118-88-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses (Chatham-Kent, Ontario Branch) (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses employed by the respondent in a nursing capacity for not more than 24 hours per week at its Chatham Branch, save and except nursing supervisor and persons above the rank of nursing supervisor" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	29
Number of persons who cast ballots	27
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	22

Applications for Certification Withdrawn

0175-84-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 628 (Applicant) v. Abitibi-Price Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 1565 (Intervener #1) v. Canadian Paperworkers Union, Locals 67, 40, 32, 109, 90, 132, 134, 133, 239, 249 (Intervener #2) v. International Association of Machinists & Aerospace Workers, Thunder Bay Lodge 1120 (Intervener #3)

1608-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Scarborough (Respondent)

3083-87-R: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Super Carnaval Food Store Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener #1) v. United Food & Commercial Workers International Union, Local 633 (Intervener #2)

3312-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Property Management Services Organization, Greenwin Property Management, Falconwin Holdings Ltd. (Respondents)

3391-87-R: Christian Labour Association of Canada (Applicant) v. Hadovoc Construction Ltd. (Respondent) v. Ontario Provincial Council of Carpenters (Intervener)

0021-88-R: International Union of Operating Engineers, Local 796 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

0112-88-R: McBrides Delivery Ltd. Employees (Applicant) v. Teamsters Union, Local 938 (Respondent)

0144-88-R: United Steelworkers of America (Applicant) v. Risdon Cosmetic Containers Inc. (Respondent)

0374-88-R: United Food & Commercial Workers International Union (Applicant) v. Swiss Chalet (Cara Operations Ltd.) (Respondent)

0382-88-R: Alliance Employees' Union (Applicant) v. Environment Component, PSAC (Respondent)

0394-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Flower Mill Hotel Inc. c.o.b. as Park Hotel (Respondent)

0422-88-R: International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of Amherstburg (Respondent)

0457-88-R: United Steelworkers of America (Applicant) v. Horon Alloys (Division of Leonore Investments) (Respondent)

0489-88-R: Graphic Communications International Union, Local 500M (Applicant) v. Formart Graphics Inc. (Respondent)

0494-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. Sentinel Steel Erectors Ltd. a/o Sentinel Contracting Ltd. (Respondent)

0510-88-R: Sudbury Mine, Mill & Smelter Workers Union, Local 598 (Applicant) v. Noramco Mining Corporation Golden Rose Mine (Respondent)

0516-88-R: Public Service Alliance of Canada (Applicant) v. Empire Maintenance Industries Inc. (Respondent) v. Labourers International Union of North America, Local 527 (Intervener)

0528-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Toronto Redi Mix Ltd. (Respondent)

0529-88-R: United Steelworkers of America (Applicant) v. Grand & Toy Ltd. (Respondent)

0597-88-R: Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Construction Ltd. (Respondent)

0608-88-R: Service Employees' International Union, Local 204, Affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. Lexogest Inc. (Respondent)

0613-88-R: Niagara Health Care & Service Workers Union, Local 302 Affiliated with the Christian Labour Association of Canada (Applicant) v. St. Catharines Place (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2221-87-FC: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Etobicoke (Respondent) (*Withdrawn*)

0381-88-FC: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Peter Piper Inn Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2192-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dalton Engineering & Construction Ltd. and Rumble Pontiac Buick (1985) Inc. (Respondents) (*Dismissed*)

0479-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 819 (Applicant) v. Calder Mechanical Services Ltd. and Superior Plumbing & Heating Co. Ltd. (Respondents) (*Withdrawn*)

1308-87-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Edwards Steel Fabricators Inc. and Grant's Sign Service Corporation (Respondents) (*Granted*)

1485-87-R; 1486-87-R: International Association of Machinists & Aerospace Workers, Local Lodge 1740 (Applicant) v. Canada Machinery Corporation and A.B.A. Tool & Die Inc. (Respondents) (*Dismissed*)

2889-87-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 506 (Applicants) v. Teperman & Sons Inc. and Cardinal Waste Management Ltd. (Respondents) (*Withdrawn*)

3487-87-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Hamilton-Haldimand Stationers Ltd. & 687458 Ontario Ltd. (Respondent) (*Granted*)

3531-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. William Kutynec Excavating & Grading c.o.b. as Williams Contracting and K.G.R. Contracting Ltd. (Respondents) (*Withdrawn*)

0456-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Carr Steel Investments Ltd., Carr Steel Construction (1987) Ltd. (Respondents) (*Withdrawn*)

0523-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

1612-86-R: Ontario Nurses' Association (Applicant) v. Spencer Brothers Nursing Home and Standard Trust (Respondents) (*Granted*)

0440-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 819 (Applicant) v. Calder Mechanical Services Ltd. and Superior Plumbing & Heating Co. Ltd. (Respondents) (*Granted*)

1307-87-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Edwards Steel Fabricators Inc. and Grant's Sign Service Corporation (Respondents) (*Withdrawn*)

2748-87-R: International Association of Machinists & Aerospace workers, Local Lodge 1740 (Applicant) v. Canada Machinery Corporation, Secord Inc., Lepper Inc., Hatt Street Properties Inc., and Dorval Group Inc. (Respondents) (*Dismissed*)

2889-87-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 506 (Applicants) v. Teperman & Sons Inc. and Cardinal Waste Management Ltd. (Respondents) (*Withdrawn*)

3054-87-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Copper Cliff Mechanical Contractors Ltd. and Copper Cliff Insulation Ltd. and Norprest Industries Ltd. (Respondents) (*Withdrawn*)

3531-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. William Kutynec Excavating & Grading c.o.b. as Williams Contracting and K.G.R. Contracting Ltd. (Respondents) (*Withdrawn*)

0141-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Dunn Paving Ltd. and Earl Jones & Sons (Respondents) (*Withdrawn*)

0378-88-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Cansteel Structural Corp., a division of 293599 Ontario Inc. and Elmara Construction Co. Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1509-87-R: United Food & Commercial Workers International Union, Local 392W (Applicant) v. Pathfinder Beverages Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2238-87-R: Betty Lou Stilwell (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Dalhousie Retirement Home Ltd. (Intervener) (*Dismissed*) (7 employees in unit)

2303-87-R: Mike Powers; on behalf of Brass Craft Employees (Applicant) v. International Association of Machinists & Aerospace Workers, District Lodge 184 (Local Lodge 2446) (Respondent) v. Brass-Craft Canada Ltd. (Intervener) (*Granted*)

Unit: "all employees of the company at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, casual employees, office and sales staff" (95 employees in unit)

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	87
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	74

2635-87-R: Eva Elizabeth Mathies (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) (*Granted*)

Unit: "all office employees of Sun Parlour Greenhouse Growers Co-Operative Limited in the Township of Mersea, save and except manager and Office Manager" (1 employee in unit)

Number of names of persons on list as originally prepared by employer	1
Number of persons who cast ballots	1

Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

3226-87-R: Sandro Di Gennaro (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. U.D.M. Excavating & Contracting Ltd. (Intervener) (*Granted*)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry other than the industrial commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

3240-87-R: Richard Askey (Applicant) v. Teamsters, Local 938 (Respondent) v. Gilbey Canada Inc. (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

3327-87-R: Shirley Winter (Applicant) v. Independent Canadian Steelworkers Union, Local 105 (Respondent) (*Withdrawn*)

3331-87-R: Robin Askin (Applicant) v. International Brotherhood of Painters & Allied Trades, Local 1824 (Respondent) v. Mike's Painting & Decorating, A Division of Mike McMahon's Painting & Decorating Ltd. (Intervener) (*Granted*)

Unit: "all painters and painters' apprentices in the employ of Mike's Painting & Decorating, A Division of Mike McMahon's Painting & Decorating Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

3357-87-R: Campeau Corporation (Applicant) v. Service Employees Union, Local 204 affiliated with the AFL:CIO:CLC (Respondent) (*Granted*)

3370-87-R: Bryan Brown (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) v. Paynel Electrical Contractors Ltd. (Intervener) (*Granted*)

Unit: "all electrical workers employed by Paynel Electrical Contractors Ltd. in the Province of Ontario" (1 employee in unit)

Number of names of persons on list as originally prepared by employer	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

3538-87-R: Gordon Restrict & Cathy Stuart (Applicants) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Adanac Hotel (Intervener) (2 employees in unit) (*Dismissed*)

0083-88-R: Hamilton Automatic Vending Company Ltd. (Applicant) v. Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers

& Helpers, and its Local 576 (Respondent) v. Group of Employees (Objectors) (*Dismissed*) (20 employees in unit)

0087-88-R: John H. Serpell (Applicant) v. United Steelworkers of America (Respondent) v. Blackwood Hodge Equipment Ltd. Central Division Sudbury Branch (Intervener) (*Granted*) (15 employees in unit)

0097-88-R: Dorothy Johnson (Applicant) v. Health Office & Professional Employees, a division of United Food & Commercial Workers International Union, Local 175 (Formerly Local 206) (Respondent) v. Tyndall Nursing Home Ltd. (Intervener) (*Dismissed*) (15 employees in unit)

0101-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. IBEW Construction Council of Ontario (Respondent) (*Withdrawn*)

0120-88-R: Juergen Heinemann (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent) v. Delta Elevator Ltd. (Intervener) (*Granted*)

Unit: "all elevator mechanics and elevator mechanics' helpers in the employ of Delta Elevator Limited in the Province of Ontario" (8 employees in unit)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	5

0198-88-R: United Steelworkers of America (Applicant) v. Allan & Marion Super Discount Marts Ltd. (Respondent) (34 employees in unit) (*Dismissed*)

0270-88-R: Employees of Versa Foods Unit #2319 Eaton Yale (Chatham) Ltd. (Applicant) v. Teamsters, Local No. 647 (Respondent) (*Withdrawn*)

0291-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. IBEW Construction Council of Ontario (Respondent) (*Withdrawn*)

0322-88-R: Labourers' International Union of North America, Local 625 (Applicant) v. IBEW Construction Council of Ontario (Respondent) (*Withdrawn*)

0341-88-R: David A. Johnson (Applicant) v. Energy Chemical Workers Union (Respondent) (*Withdrawn*)

0398-88-R: Thakur Verma (Applicant) v. United Steelworkers of America (Respondent) v. Merit Automotive Products Ltd. (Intervener) v. Group of Employees (Objectors) (*Granted*)

Unit: "all employees of Merit Automotive Products Ltd. in Metropolitan Toronto and within 50 kilometres of their present location save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (18 employees in unit)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	14

0426-88-R: Musial Kazimiere (Applicant) v. United Steelworkers of America (Respondent) (3 employees in unit) (*Granted*)

0511-88-R: Joey Gagnier (Applicant) v. Pattern & Model Makers' Association of Warren & Vicinity (AFL: - CIO) Affiliated with the Pattern Makers' League of North America (Respondent) (*Withdrawn*)

0513-88-R: Marna Skinkle (Applicant) v. Service Employees Union, Local 183 (Respondent) (3 employees in unit) (*Granted*)

0567-88-R: James S. Sheridan (Applicant) v. Glass, Pottery, Plastics & Allied Workers International Union, Local No. 366 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0616-88-U: Sutherland-Schultz Ltd. (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 785 and Karl Ball; United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527, Al Steffler, Jim Hilker, Ted Benedict, Ron Hallman, Gary Arnott and Keith Acton; International Brotherhood of Electrical Workers, Local 804 Wayne Lehman, Walter Schlueter, David Worton and Peter Weber; International Union of Operating Engineers, Local 793 and Ron Hunt (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0242-84-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 628 (Complainant) v. Abitibi-Price Inc. - Fort Williams Division (Respondent) v. Canadian Paperworkers Union, Locals 67, 40, 32, 109, 134, 239, 132, & 133 (Intervener #1) v. International Association of Machinists & Aerospace Workers, Lodge 1120 (Intervener #2) (*Withdrawn*)

3569-86-U: The Sault Ste. Marie Typographical Union No. 746 (Complainant) v. The Sault Star, A Division of Southam Inc. (Respondent) (*Granted*)

0867-87-U: International Association of Machinists & Aerospace Workers, Local Lodge 1740 (Complainant) v. Canada Machinery Corporation (Respondent) (*Dismissed*)

2101-87-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Complainant) v. KWS Energy Services Ltd. (Respondent) (*Granted*)

2167-87-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Peter's Fantastic Foods Inc. (Respondent) (*Withdrawn*)

2248-87-U: Toronto Typographical Union, Number 91 (Complainant) v. Ontario Banknote Ltd. (Respondent) (*Dismissed*)

2275-87-U: Teamsters, Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Barouh Eaton (Canada) Ltd. and Ron Gibbons (Respondents) (*Granted*)

2341-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Allmac Storage Systems (Respondent) (*Withdrawn*)

2631-87-U: United Steelworkers of America (Complainant) v. Gelderland Ltd. (Respondent) (*Withdrawn*)

2802-87-U: Giulio Vecchiarelli, Giuseppe Vitali, Domenico Ramundo, Alfredo Paolucci, Peter Lim, Eric Hilaby and Angelo Amoroso (Complainants) v. Canadian Union of Public Employees, Local 1571 (Respondent) (*Withdrawn*)

2876-87-U: Mrs. Stella Golocevac (Complainant) v. Mike Cecile, Committee Man of CAW-UAW, Local 1973, General Motors Trim Plant (Respondents) (*Withdrawn*)

2877-87-U: Mrs. Stella Golocevac (Complainant) v. Jerome Clark, General Motors Trim Plant (Respondents) (*Withdrawn*)

2941-87-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 340 (Respondent) (*Withdrawn*)

2986-87-U: Felicia Best (Complainant) v. Teamsters Local No. 419 (Respondent) v. Oshawa Foods Division of the Oshawa Group Ltd. (Intervener) (*Withdrawn*)

2989-87-U: James Vlahos (Complainant) v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local No. 173 and Famous Players Ltd. (Respondents) (*Withdrawn*)

3116-87-U: United Food & Commercial Workers International Union, Locals 175 & 633 (Complainant) v. Super Carnaval Food Store Ltd. and Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondents) (*Withdrawn*)

3179-87-U: Ontario Liquor Boards Employees Union (Complainant) v. The Thousand Island Tax - Duty Free Store Ltd. (Respondent) (*Withdrawn*)

3209-87-U: Mrs. Stella Golocevac (Complainant) v. Jerome Clarke (also known as) Jerome Vincent Clarke, G.M. Company Supervisor - Cutting Room Dept. #52101 General Motors Trim Plant (Respondents) (*Withdrawn*)

3210-87-U: Alain Lortie (Complainant) v. Canadian Union of Public Employees, Local 20 (Respondent) v. The Corporation of the City of Vanier (Intervener) (*Withdrawn*)

3219-87-U: Teamsters, Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Anthes Equipment (Respondent) (*Withdrawn*)

3280-87-U: International Union of Bricklayers & Allied Craftsmen, Local 1 (Complainant) v. Stelco Inc. (Hilton Works) (Respondent) (*Withdrawn*)

3281-87-U: Graphic Communications International Union, Local 500M (Complainant) v. Globe Graphic Communications Inc. (Metropolitan Toronto) (Respondent) (*Withdrawn*)

3314-87-U: United Food & Commercial Workers International Union, AFL:CIO:CLC (Complainant) v. Hamilton Haldimand Stationers Ltd. (Respondent) (*Withdrawn*)

3344-87-U: Norman Edmondson (Complainant) v. Four Valleys Excavating & Grading Co. Ltd. (Respondent) (*Withdrawn*)

3423-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Madeleine Mines Ltd. (Respondent) (*Granted*)

3439-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Lake Erie Foods Inc. (Respondent) (*Withdrawn*)

3565-87-U: Canada Hair Cloth Co. Ltd. (Complainant) v. Al Thompson and Canada Hair Cloth Employees Association (Respondent) (*Withdrawn*)

0038-88-U: United Food & Commercial Workers International Union (Complainant) v. Hamilton-Haldimand Stationers Ltd. and 687458 Ontario Ltd. (c.o.b. as Arcraft Press) (Respondents) (*Withdrawn*)

0080-88-U: Graphic Communications International Union, Local 500M (Complainant) v. Computer Forms Inc. (Respondent) (*Withdrawn*)

0102-88-U: Labourers' International Union of North America, Local 1059 (Complainant) v. IBEW Construction Council of Ontario and Devgroup Ltd. (Respondents) (*Withdrawn*)

0107-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Amertek Inc. (Respondent) (*Granted*)

0133-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Canadian Corporate Management Company Ltd., c.o.b. as Cashway Building Centre (Respondent) (*Withdrawn*)

0135-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Beaver Lumber Company Ltd. and Larry Wilkinson, John Martin, Rich McDonald, Peter Paquette (Respondents) (*Withdrawn*)

0138-88-U: Leslie R. Sutton and David J. Callaghan (Complainant) v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 173 (I.A.T.S.E.) (Respondent) (*Withdrawn*)

0183-88-U: Claudio Montanaro (Complainant) v. John Askins - Local 220 S.E.I.U. (Respondent) (*Withdrawn*)

0204-88-U: United Brotherhood of Carpenters & Joiners of America, Local 18 (Complainant) v. McLean Younge Construction Ltd. (Respondent) (*Dismissed*)

0205-88-U: Canadian Paperworkers Union (Complainant) v. Great Lakes Forest Products Ltd. (Respondent) (*Withdrawn*)

0242-88-U: Ontario Secondary School Teachers' Federation (Complainant) v. The Board of Education for the City of London (Respondent) (*Withdrawn*)

0252-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers' Union of Canada (CAW-Canada), Local 27 (Respondent) (*Withdrawn*)

0265-88-U: Lloyd Lane (Complainant) v. Sheet Metal Workers, Local 234 (Respondent) (*Withdrawn*)

0267-88-U: Assunta Celluci (Complainant) v. United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Respondent) (*Withdrawn*)

0275-88-U: Canadian Union of Public Employees (Complainant) v. St. Jacques Nursing Home (Respondent) (*Withdrawn*)

0279-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. IBEW Construction Council of Ontario and Devgroup Ltd. (Respondents) (*Withdrawn*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1988



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: COLLEEN EDWARDS

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Construction Industry - Certification - Membership Evidence - Parties advised at hearing that two membership cards did not contain the local number and one had only been signed on the receipt portion - Form 80 disclosing no exceptions - Board not granting leave to file an amended Form 80 declaration given the importance of the document - Two cards without local number not reliable membership evidence - Card containing signature on receipt portion only acceptable - Respondent employer's name on card not required - Form 80 proper given the defects in question - Working foreman found not to be an employee for purposes of the application because he exercises managerial functions - Vote ordered

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P. & M. ELECTRIC (1982) LTD.; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES.....

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Membership Evidence - Certification - Timeliness - Employee objectors requesting an extension of the terminal date - Board exercising its discretion not to extend terminal date - Time is of the essence in certification matters - Both Form 6 and poster clearly explain how objections must be filed - Certificate issuing

MATHERS CONCRETE, PAVAGE ET BÉTONNIÈRE ST-EUSTACHE LTÉE, CARRYING ON BUSINESS AS; RE TEAMSTERS', LOCAL 230; RE DANIEL OLIVIER ON BEHALF OF A GROUP OF EMPLOYEES

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Natural Justice - Certification - Construction Industry - Practice and Procedure - Board required to determine whether collective agreement bar to certification application - Board receiving *viva voce* and documentary evidence on that issue but insufficient time to receive oral submissions - Written submission requested - Intervener objecting to being deprived of opportunity of making oral submissions - Board considering factors such as its power to determine its own practice and procedure, the parties having had the opportunity of presenting witnesses, and expedition - Board ordering that written submissions be filed

CONSTRUCTION 2000, 704039 ONTARIO LIMITED, CARRYING ON BUSINESS AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES.....

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Natural Justice - Jurisdictional Dispute - Practice and Procedure - Reconsideration - Strike - Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice - No necessity for formal hearing - Board having no obligation to consult if pleadings do not disclose a basis for making an interim order - Reconsideration dismissed

NEWMARCH MECHANICAL LIMITED AND U.A., LOCAL 463; RE B.S.O.I.W., LOCAL 721

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Parties - Collective Agreement - Conciliation - Reference - Union Successor Status - Local 206 certified by Board - Local 175 requesting a conciliation officer - Whether Minister having authority to appoint a conciliation officer - Purported merger occurring before Local 206 certified - Board not having authority to declare Local 175 a successor - Minister not having authority to appoint a conciliation officer at the request of Local 175

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Parties - Practice and Procedure - Termination - Termination application referring to District Council and one local - Province-wide agreement naming District Council and all affiliated union locals as parties - International, District Council and all affiliated union locals necessary parties - Applicant allowed to amend title of application to include all those local unions named in the collective agreement as respondents

DOUBLE S CONSTRUCTION, 657572 ONTARIO INC. C.O.B. AS; RE MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNION L.I.U.N.A., LOCAL 1036.....

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ART SHOPPE; RE MARK ENGLEDEEN	729
Sale of a Business - Employer with established meat packing business acquiring a federally inspected plant and assets from trustee in bankruptcy - Bad will associated with predecessor employer due to allegations of selling tainted meat - Plant seven times larger than required - Employer having hope of expanding his business - Services of predecessor's plant manager retained - Few customers acquired - Board analyzing sale jurisprudence and finding no sale of a business - Subsequent failure of a business after it has been acquired need not negate a finding that there has been a sale of a business - Mere intention to acquire a business will not necessarily result in a declaration - Transfer of a federally inspected plant not analogous to "transfer of a licence" cases - Key elements of wholesale meat packing business are entrepreneurial ability and customer base - Application dismissed	
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Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice - No necessity for formal hearing - Board having no obligation to consult if pleadings do not disclose a basis for making an interim order - Reconsideration dismissed

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Termination - Construction Industry - Timeliness - Union certified pursuant to section 8 - Parties immediately bound by province-wide agreement - Termination application filed 10 weeks later during last two months of collective agreement - Application timely - Petition in certification case not an "unsuccessful application" which would allow the Board to exercise its discretion to bar the termination application

M & AL ROOFING LTD.; RE BRIAN MASSÉ; RE THE BUILT-UP ROOFERS,
DAMP & WATERPROOFING SECTION OF THE ONTARIO SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, AND S.M.W., LOCAL 47 821

Termination - Parties - Practice and Procedure - Termination application referring to District Council and one local - Province-wide agreement naming District Council and all affiliated union locals as parties - International, District Council and all affiliated union locals necessary parties - Applicant allowed to amend title of application to include all those local unions named in the collective agreement as respondents

DOUBLE S CONSTRUCTION, 657572 ONTARIO INC. C.O.B. AS; RE MICHAEL
VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI; RE
L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED
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Timeliness - Certification - Membership Evidence - Employee objectors requesting an extension of the terminal date - Board exercising its discretion not to extend terminal date - Time is of the essence in certification matters - Both Form 6 and poster clearly explain how objections must be filed - Certificate issuing

MATHERS CONCRETE, PAVAGE ET BÉTONNIÈRE ST-EUSTACHE LTÉE, CAR-
RYING ON BUSINESS AS; RE TEAMSTERS', LOCAL 230; RE DANIEL OLIVIER
ON BEHALF OF A GROUP OF EMPLOYEES 830

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DAMP & WATERPROOFING SECTION OF THE ONTARIO SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, AND S.M.W., LOCAL 47 821

Trade Union Status - Bargaining Unit - Certification - Applicant had existed as an association representing full-time faculty since the 1950's - Constitution amended in 1970's to make reference to academic personnel and to set up two categories of members - Motion to admit librarians to membership made after application date - Board finding that applicant a trade union - Applicant's capacity to represent professional librarians going not to trade union status but the question of whether the applicant should be certified to represent a unit which includes professional librarians - Reference to academic personnel in constitution sufficiently broad to permit applicant to represent librarians - Nothing in bylaws requiring

discriminatory treatment of two categories of membership - Board officer appointed to inquire into community of interest between librarians and faculty

WILFRID LAURIER UNIVERSITY; RE WILFRID LAURIER UNIVERSITY FAC-
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Unfair Labour Practice - Arbitration - Interference in Trade Unions - UFCW entering into collec-
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RWDSU - RWDSU bringing complaints against employer for alleged pattern of harass-
ment - Board declining to defer to arbitration

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W.,
LOCAL 175

768

Union Successor Status - Collective Agreement - Conciliation - Parties - Reference - Local 206
certified by Board - Local 175 requesting a conciliation officer - Whether Minister having
authority to appoint a conciliation officer - Purported merger occurring before Local 206
certified - Board not having authority to declare Local 175 a successor - Minister not having
authority to appoint a conciliation officer at the request of Local 175

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF
EMPLOYEES

810

0119-88-OH Mark Engleden, Complainant v. Art Shoppe, Respondent

Discharge - Health and Safety - Remedy - Furniture handler discharged for refusing to lift hutch - Worker feared his back would be injured - Another worker lifted hutch - OHSA violated - Worker had reasonable grounds to refuse to lift the hutch without assistance - Other worker not injuring himself not much help in determining whether reasonable grounds - Worker admitting he would have left job soon anyway - Compensation only awarded

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

APPEARANCES: *Mark Engleden* for the complainant; *Peter J. H. Neal* for the respondent.

DECISION OF THE BOARD; August 5, 1988

1. This is a complaint alleging that the respondent violated section 24 of the *Occupational Health and Safety Act* (OHSA) by discharging the complainant because he refused to perform unsafe work.

2. The complainant, Mark Engleden, was hired by the respondent on March 26th, 1988 to work in its furniture warehouse. As part of his job interview, Mr. Engleden was asked by Peter Neal, the respondent's administrator, to lift a dresser with another worker. Mr. Neal testified that this dresser weighed 168 pounds. Having performed what Mr. Neal referred to as a test, Mr. Engleden was accepted for employment. It was suggested to him at that time by Mr. Neal that he might eventually progress to the position of a van driver, but Mr. Engleden agreed that no guarantees were extended by Mr. Neal in this regard.

3. The evidence made it clear that Mr. Engleden was not a satisfactory employee from the respondent's point of view. Within the first two weeks of his employment, he was late for work four times, ranging from two minutes to thirteen minutes late. In addition, he had arranged with Mr. Neal at the time of his hiring to take time off during the first week to sit for a driver's examination to up-grade his driver's license. Mr. Engleden referred to this as having arranged the day off for this purpose, while Mr. Neal told the Board that he had expected him back that afternoon and was annoyed when Mr. Engleden did not report for work at that time. On the Wednesday of his second week of employment, Mr. Engleden broke out in a rash and decided to see a doctor that morning. He attempted to notify the respondent accordingly, but the telephone number listed in the telephone book for the respondent connected only to a recorded message. He attended at his doctor's office and eventually arrived for work at 1:30 p.m. At that time, he submitted a doctor's note to his supervisor, Ray Brufatto Sr. He also showed him the rash in question. From Mr. Neal's point of view, Mr. Engleden had failed to report for work that morning without notifying the respondent.

4. On April 15th, Mr. Engleden reported for work as usual. On that day the warehouse was short-staffed because one employee had quit, another had been transferred to another department and a third had injured himself at work and was not available to help with lifting. Mr. Engleden was asked to lift a travertine table with another employee, which he estimated as weighing approximately three hundred pounds, an estimate which was not challenged by the respondent. In addition to its weight, Mr. Engleden described the lifting motion necessary as awkward because the table was on its side, surrounded by crate packaging containing protruding nails. Mr. Engleden told his supervisor that he was concerned that he might injure his back. Mr. Brufatto accordingly assigned other employees to lift the table. Mr. Engleden was then assigned to lift a hutch with another employee from either ground level, or a dolly two or three inches off ground level, to the

top of a cabinet approximately three and one-half feet high. Mr. Engleden estimated the weight of the hutch to be between 200 and 300 pounds. In argument, Mr. Neal asserted that it was 230 pounds. Mr. Engleden accidentally dropped his end of the hutch. He then told his supervisor he was not prepared to lift the hutch either and that he was refusing to work under the OHSA because he was afraid he would injure his back. Mr. Brufatto consequently assigned Mr. Engleden to another job feeding refuse into a garbage compactor, and notified Mr. Neal of Mr. Engleden's refusal.

5. Mr. Neal went over to where Mr. Engleden was working and asked him what the problem was. Mr. Engleden explained again that he was refusing to lift the hutch under the OHSA because he was afraid he would injure his back. Mr. Neal then fired him. Mr. Engleden suggested to him that he was supposed to conduct an investigation, and Mr. Neal told him that he had lifted the hutch himself with another employee and that it was not too heavy. Mr. Engleden subsequently filed this complaint.

6. Sections 23 and 24 of the OHSA provide as follows:

(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;

- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

7. In *Inco Metals Co.*, [1980] OLRB Rep. July 981, the Board in considering the predecessor to these sections said that it “must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy”. After reviewing those shortcomings at some length, together with the social and human toll taken by industrial accidents and their adverse impact on the economy, the Board concluded that the predecessor provisions “must be given a liberal and constructive interpretation that is consistent with the intent of the legislation”.

8. Similarly, the Board observed in *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834:

We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues at the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a “neutral” official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals....

The Board has commented that initially an employee may refuse work which he or she has reason to believe is unsafe, a test which is subjective in its nature (see, for example, *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). Where there is such a refusal, the employer is required to investigate the matter forthwith in the manner set out in section 23. Following that investigation or steps taken to deal with the circumstances that prompted the work refusal, the worker may continue to refuse if he or she has reasonable grounds to believe that the work is unsafe. The Board has concluded that this subsequent test is an objective one, and has adopted this enunciation of the test set out in *Inco Metals*, *supra*, with respect to the predecessor legislation (see for example, *Camco Inc.*, [1985] OLRB Rep. Oct. 1431):

59. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exer-

cising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

Where the worker continues to refuse, an inspector is required to investigate the refusal in the presence of the employer, the worker and an employee representative after which the inspector gives his or her decision in writing to the parties.

9. At no stage must an employee be proven correct with respect to the safety of the work. Rather, in *Inco, supra*, the Board said that it will look at the reasonableness of the employees' views in light of the information available to the worker at the time of the refusal:

The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

See also *Imperial Oil Ltd.*, [1982] OLRB Rep. Apr. 580, and *Wilco Canada Inc.*, [1983] OLRB Rep. Oct. 1759 in this regard.

10. In this case, it was not disputed by the employer that at least one of the reasons Mr. Engleden was discharged was because he had refused to lift the hutch. While it was clear that Mr. Neal found him an unsatisfactory employee in other respects, the respondent did not suggest that Mr. Engleden was fired for tardiness or his absences rather than for his work refusal. Instead it appeared that when Mr. Engleden refused to lift the hutch, it was the last straw as far as Mr. Neal was concerned from an employee whose work habits had already showed shortcomings. As the Board noted in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961, if only one of the reasons for the penalty imposed is the exercise of rights under the OHSA, a violation of section 24 occurs. Here it was not denied that Mr. Engleden's refusal triggered his discharge, although there were additional reasons why Mr. Neal was not satisfied with his work performance. Neither Mr. Engleden's deficiencies as an employee, nor his short period of service disentitle him from the protection offered by section 24 of the *Occupational Health and Safety Act* although these factors might be relevant if the reasons for his discharge were in dispute. In this case, however, as noted above, it was not disputed by the respondent that Mr. Engledon's work refusal was at least one of the reasons for his discharge.

11. We must therefore determine whether Mr. Engleden was acting in compliance with the OHSA at the time of his refusal. Under section 23 this involves first ascertaining whether he had reason to believe that lifting the hutch was unsafe. Mr. Engleden told the Board that he felt that lifting the hutch was unsafe both because of its weight and because it had to be lifted from ground level or shortly above to waist level. He testified it was his understanding that most workers' compensation claims were claims involving injured backs, and that he did not want to end up on compensation where, as he put it, he would be no good to anybody. Mr. Engleden estimated weights on two previous jobs he held as a shipper-receiver, and he believed that the hutch weighed between 200 and 300 pounds. Thus, he concluded that his share of that weight when lifted with another employee would be between 100 and 150 pounds. He testified that normally more employees are available to help lift heavy furniture. Although it was clear that he was somewhat disenchanted with his job generally, it was also obvious that he was genuinely concerned about his back. In these circumstances we find that the complainant had reason to believe, in a subjective sense, that lifting the hutch was unsafe.

12. It is open to serious question whether Mr. Neal or Mr. Brufatto's actions constituted an

investigation under section 23(4). Among other things, that provision specifically requires that the employer conduct the investigation “in the presence of the worker”. However, assuming without deciding that the respondent did fulfill the requirements of section 23(4), we are satisfied on the totality of the evidence that the complainant had reasonable grounds for continuing to refuse to lift the hutch without more assistance. To some extent it may fairly be said that the weight of the dresser and the type of lift speak for themselves. Assuming the respondent’s weight estimates are more accurate than the complainant’s, Mr. Engleden was required to lift a large and awkward piece of furniture weighing approximately 230 pounds with the help of another employee. The type of lift required, even if performed properly, would by its nature tend to expose Mr. Engleden’s back to considerable strain. We note that Mr. Engleden would not have a significant degree of control over the lift, and that depending on the shifts in weight which might occur and the strength and ability of his co-worker, the share of the load on Mr. Engleden might vary substantially. In addition, Mr. Engleden was a new and inexperienced employee. Mr. Neal acknowledged that new employees were introduced to lifting heavier items of furniture gradually to give them time to build up their strength and proficiency, (although in his view, the hutch was not a heavy item).

13. Mr. Neal’s central argument with respect to the weight of the hutch was that he himself, an older man than Mr. Engleden, had lifted it with another employee and that therefore it was not too heavy. While this is a relevant fact to consider, we do not find it persuasive in this case. Mr. Engleden’s position was not that he could not lift the hutch at all, but that he was afraid of incurring injury in the process. The fact that Mr. Neal did not injure himself in lifting the hutch once does not necessarily shed much light on whether the complainant had reasonable grounds to believe that the lift was generally unsafe. Work injuries are not consistent or reliable occurrences, and the fact that on one occasion, one person has performed a motion without injury does not mean that an injury may not occur to another, particularly if the latter is required to perform the motion with more frequency, or has relatively little experience.

14. Mr. Neal also argued that his practice was that if employees began to experience sore arms, legs or back, that employee would not be required to lift at that point. He specifically asked Mr. Brufatto at the time if Mr. Engleden was complaining of a sore back, and Mr. Brufatto replied he was not. However, an employee does not have to experience some degree of injury before he or she can exercise rights under section 23. Indeed, one of the primary purposes of that section is to prevent injuries before they occur.

15. Mr. Neal was also of the view that Mr. Engleden had been hired for a heavy lifting job and that he was no good to the respondent if he couldn’t perform the work. We note several things in this regard. His argument suggests that Mr. Engleden could be estopped from asserting statutory rights under sections 23 and 24. It is doubtful that this is appropriate or allowable given the thrust of the *Occupational Health and Safety Act* and its remedial purposes. However, it is not necessary for us to address this question as in any event Mr. Engleden was asked at his job interview to lift an item that was some 60 pounds lighter than the hutch, again using Mr. Neal’s weight estimates. Thus, even if Mr. Engleden’s acceptance of the job offer after the test could be considered some kind of agreement or estoppel with respect to lifting, simply on the facts such an agreement could not be extended to the hutch. There is no doubt that the furniture warehouse job involves heavy lifting and that as a general proposition, the respondent is entitled to have employees perform the work assigned to them. This does not mean, however, that Mr. Engleden can be required to lift an unlimited amount of weight. In this regard we note that Mr. Engleden’s testimony that heavier items are sometimes lifted by four employees rather than two was undisputed.

16. Mr. Neal also appeared to be indignant that Mr. Engleden had called what he described as the Labour Board to ascertain his rights under the *Occupational Health and Safety Act* before

the day on which the incident occurred. We have some doubts as to whether Mr. Engleden was in fact speaking to any personnel at the Ontario Labour Relations Board. However, in any event, this course of action does not strike us as reprehensible in any way. In general the Board encourages employees to ascertain their legal rights and goes to some lengths to notify and inform them accordingly through the use of posted notices and other informational material.

17. For the foregoing reasons, we conclude that the respondent has not met the burden of proof placed upon it by section 24(5) of establishing on the balance of probabilities that it did not act contrary to section 24(1) in dismissing the complainant. Accordingly, we find that the respondent's actions constituted a violation of section 24(1) of the *Occupational Health and Safety Act*.

18. Turning to the issue of remedy, Mr. Engleden candidly told the Board that he was not happy with his employment with the respondent, and that he thought he would have left in any event approximately a month after he was discharged. The remedy for this kind of violation is not intended to be a windfall for employees, but rather compensation for losses suffered as a result of the respondent's violation of section 24. We are not therefore prepared to direct any other remedy beyond the wages and benefits lost by Mr. Engleden during the thirty day period following his discharge, together with interest to be calculated in accordance with the Board's Practice Note #13.

1207-87-R The United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant v. Calvano Lumber & Trim Co. Ltd., Respondent

Certification - Charges - Membership Evidence - Allegation that employee had not on his own behalf paid at least one dollar in respect of union membership fees - Co-worker having given the employee the dollar - No discussion about repayment - No "loan" indicated on Form 80 declaration - Board will not scrutinize the advance of small sums of money from one rank-and-file employee to another by way of gift or loan unless there is evidence of membership buying - Artificial to focus on the presumed intent to repay of an individual employee in respect of such a trivial though symbolic sum of money - No misstatement on Form 80

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Michael A. Church* and *Luis Camara* for the applicant; *Donald B. Jarvis*, *David T. Cote* and *Antony Calvano* for the respondent.

DECISION OF THE BOARD; August 17, 1988

I

1. This is an application for certification which was filed on July 31, 1987. The matter came on for hearing before the Board on September 24, 1987.

2. In a decision dated the following day, the Board certified the applicant union as bargaining agent for a unit of employees described as follows:

All employees of the respondent in the City of Mississauga, save and except

office, clerical and sales staff, foreman and persons above the rank of foreman.

Subsequently, the respondent sought reconsideration of that decision, and a hearing to entertain its representations took place in Toronto on April 29, 1988. At that hearing, counsel for the parties reached the following agreement:

MEMORANDUM OF AGREEMENT

WHEREAS the Applicant filed an Application for Certification with the Board dated July 30, 1987 (Bd. File: 1207-87-R);

AND WHEREAS the Board issued a decision and certificate dated September 25, 1987;

AND WHEREAS the Respondent has filed an Application for Reconsideration dated November 13, 1987;

AND WHEREAS the parties are agreed to the following terms to be issued as an Order of the Board on consent;

1. The parties agree to the Board listing this matter for a certification hearing in the normal manner as soon as possible for the purposes of determining the issues as set out below;

2. The parties agree that there shall be no change in the application date (July 30, 1987) or terminal date (August 17, 1987);

3. The Respondent agrees that it has no other objections regarding the sufficiency of notice to the Company or its employees;

4. The parties agree to request the Board to rescind its decision of September 25, 1987 and the Certificate referred to above and to determine the issues set out below;

5. It is agreed that:

- a) the Applicant is a trade union within the meaning of the *Act*;
- b) the Respondent is properly named herein;
- c) the application shall be treated as an application that does not pertain to the construction industry (in accordance with paragraph 3 of the Board's original decision referred to above);
- d) the bargaining unit shall be described as set out in the Board's decision of September 25, 1987 save for the Respondent's right to make submissions regarding part time exclusions;
- e) that Russell Comeau was an employee in the bargaining unit at work on the day in question. The employment status of a second person known as "Sergio" is in dispute between the parties;
- f) Accordingly the parties agree that the issue to be determined at the certification hearing is whether the second person ("Sergio") is an employee and if so whether he and Comeau are both members of an appropriate bargaining unit;
- g) Save and except for the Board's determination of the alleged "non-pay" issue (for which the Applicant reserves the right to contest and object) the parties agree that if the Board determines the individual known as "Sergio" to be an employee in the same bargaining unit as Russell Comeau, then the

Applicant shall be certified (in accordance with the Board's original decision referred to above);

- h) there shall be no further issues, additions or deletions to the list raised by the Applicant or Respondent.

Dated at Toronto this 29th day of April, 1988.

For the Applicant:

"Luis Camara"
Luis Camara

For the Respondent:

"Stewart Saxe"
Stewart Saxe

The Board accepted the parties' agreement as to the appropriate mode of procedure, undertook its usual investigation with respect to the alleged "non-pay issue" mentioned in paragraph 5(g) of the parties' agreement, and re-listed the case for further hearing. The matter came on again before the Board on June 24, 1988.

3. At the hearing on June 24, 1988, counsel for the union and the respondent employer agreed that the only matter which would be addressed was the allegation that an employee named Comeau had not, on his own behalf, paid at least one dollar in respect of union membership fees so as to become a "member" of the trade union within the meaning of section 1(1)(l) of the *Labour Relations Act*. This was the so-called "non-pay" referred to above. We should note, however, that Comeau did sign a document which contains a portion wherein he makes application to become a member of the applicant, and a portion where he purports to certify that \$1.00 "was paid by me as evidence of good faith in my application for membership". Mr. Comeau has personally signed both the "application portion" of the membership document and the "receipt portion". His signature is not disputed. He has also filled in or provided information concerning his birth date, address, phone number, and current employer - in this case the respondent. The membership document was solicited and witnessed by Luis Camara, an organizer for the applicant union whose signature appears as "collector" beside that of Mr. Comeau.

4. In summary, then, the document signed by Mr. Comeau (twice) constitutes an application to become a member of the applicant union, and authorizes the applicant, unequivocally, to represent him as collective bargaining agent. There is no ambiguity in the document itself nor any suggestion that it did not, at the time, represent the voluntary wishes of the individual who signed it. There is no assertion that Mr. Comeau was threatened in any way or that there was any intimidation or misrepresentation or that he did not know what he was signing; nor has Mr. Comeau himself indicated any subsequent change of heart. Mr. Comeau confirms that he has made a one dollar payment. The "defect", if there is one, involves the way in which the \$1.00 payment was forthcoming, and whether, in all the circumstances, it could be said that Mr. Comeau really did pay \$1.00 "on his own behalf" as he declared himself to be doing at the time. This is the issue raised by the employer.

II

5. The basic facts are not in dispute. In late July 1987, Luis Camara, a recently-hired organizer for the union, noticed a company named "Calvano" on a job site that he was then visiting. Camara approached the two individuals apparently working for that company and spoke to them about the benefits of trade union representation. Following this discussion, both Mr. Comeau and Sergio Luna eventually signed membership cards in the form described above. Luna produced the \$1.00 payment immediately but Comeau did not have a dollar at the time, and turned to Luna,

his co-worker, for assistance. Luna gave Comeau a dollar, and Comeau, in turn, gave a dollar to Camara.

6. As between Comeau and Luna there was no discussion about the responsibility for repayment of the dollar nor any undertaking to do so. Given the nominal amount involved, Comeau really did not give it much thought. He had an intention, and was prepared to repay this "loan", if asked, but because Luna was only sporadically employed, no one really raised the issue. In the result, Comeau did not repay the \$1.00 to Mr. Luna. Mr. Camara, the collector, did not pursue Comeau to find out whether the \$1.00 had ever been repaid, and Mr. Comeau never volunteered the information that it had not been repaid.

7. Form 80 filed in support of this application includes the following paragraph:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereof on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

No exceptions are listed. Mr. Camara, the signatory to the Form 80 declaration, does not stipulate that there may have been a "loan" or some other transfer of funds between Mr. Luna and Mr. Comeau, even though he was there at the time.

8. The respondent contends that Mr. Comeau should not be treated as a union "member" within the meaning of section 1(1)(l) of the Act, because he has not paid at least \$1.00 "on his own behalf" as prescribed by that section. There is, the employer argues, no real financial sacrifice on Mr. Comeau's part, because he obtained the dollar tendered in support of his membership application from another employee, and there was no demand or perhaps even expectation of repayment. Furthermore, the company asserts, the failure of the union organizer to record the "loan" on the Form 80 declaration invalidates that document in its entirety and is therefore fatal to the whole application. We were referred to a number of cases including *N. A. Constructions*, [1982] OLRB Rep. Jan. 77 and *Laidlaw Wire of Canada Ltd.*, [1985] OLRB Rep. Oct. 1479. Both cases make reference to a 1953 decision of the Board in *RCA Victor Company Ltd.*, 53 CLLC ¶17,067 where this was said:

It need hardly be pointed out that the Board cannot accept as evidence of payment anything in the nature of a monetary contribution from a person other than an applicant for membership. The money payment constitutes confirmatory evidence of the desire of the payer to become a member of the trade union. If no financial sacrifice is made by the person himself, the only evidence submitted on his behalf is a signature on an application card which the Board has long since held to be inadequate to establish membership. On the other hand, not every loan to a prospective member, especially where the money is repaid, will be fatal to an applicant's case.

The respondent argues that the critical element in the legal equation is whether the employee has a subjective intention to repay any money borrowed from fellow workers. The employee's intention with respect to union membership itself, or support for the union's certification application must not be pursued because pursuant to Rule 73, membership must be ascertained solely on the basis of documentary evidence.

III

9. Whatever may have been the case 35 years ago when *RCA Victor* was decided (when, it might be noted, there was no provision in the *Labour Relations Act* equivalent to section 1(1)(l)), it is obvious, today, that a payment of one dollar cannot realistically be considered to be much of a “financial sacrifice”. Its purpose is symbolic, and to provide a simple statutory formula for determining union membership without, in each case, an inquiry into the terms of the union constitution defining initiation requirements, membership obligations and so on. In order to facilitate the processing of certification applications (which now number well over a thousand each year), the Legislature has established a simple standard of “membership” for statutory purposes. It is important that trade unions relying on that formula adhere to the prescribed standard. Ordinarily, the membership evidence is not revealed to the employer (see section 111 of the Act and *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223), and against that background the Board is entitled to demand strict compliance with the statutory requirements. Failure to collect the \$1.00 payment contemplated by the Act, or to conduct the inquiries necessary to complete the Form 80 declaration, can result in the rejection of the union’s membership evidence and a dismissal of the application.

10. On the other hand, there comes a point when technical adherence to alleged “rules” drifts into artificiality and becomes increasingly remote from the real life experience of employees in the work place, whose interests must also be considered if the Board is to faithfully fulfill its statutory mandate. Does the ordinary employee in a plant, or on a construction site, seriously distinguish between a “bona fide” loan of a dollar which s/he “solemnly” undertakes to repay, or an outright gift of what, today, is a nominal amount? Does a dollar received by an employee in this way cease to be “his own”, to use as s/he wishes, because it may be a gift, or there may be no undertaking or real concern about its repayment? We do not think so; moreover, as early as 1958 in *Webster Air Equipment Co. Ltd.*, 58 CLLC ¶18,110 the Board indicated that it was “not greatly concerned about isolated instances of money being advanced by one employee to another”. The Board recognized that these cash transfers were a natural incident of an established relationship between fellow employees who accommodate each other, from time to time, when they are short of funds. Usually there is an expectation of reciprocity, but no one keeps a ledger cataloguing the number of cups of coffee, soft drinks, muffins, chocolate bars or small sums owed to, or by, a fellow employee.

11. What the Board was suggesting in *Webster Air Equipment*, and what we here confirm, is that the Board will not ordinarily be concerned about the advance of small sums of money from one rank-and-file employee to another whether by way of “gift” or “loan”, nor will they be the subject of Board scrutiny, unless the evidence suggests that a union official or the “collector” or perhaps some fervent union supporter was, in effect, “buying memberships”. In such cases the Board might well disregard the membership documents altogether or seek the confirmatory evidence of a representation vote. However, it is totally artificial and unrealistic to focus upon the expressed or presumed “intent to repay” of an individual employee in respect of the relatively trivial sum necessary to meet a statutory requirement which today is merely symbolic.

IV

12. In the instant case we are satisfied that Mr. Comeau, to the extent that he thought about it at all, intended to and would have repaid the dollar to Mr. Luna, if Mr. Luna had raised the matter or really expected formal repayment; or, alternatively, that this minor amount was a gift, to be used by Mr. Comeau as he saw fit - either to buy a coffee or, in this case, to provide the token amount required to confirm his written intention to join the trade union and seek its representation. The transfer of one dollar from Mr. Luna to Mr. Comeau was a private arrangement,

and, once consummated, left Mr. Comeau with a dollar to dispose of as he pleased. It was his money which was tendered on his own behalf to support his written signification that he wished to join and be represented by a trade union.

13. In conclusion then, whether the origin of the dollar in question is characterized as a "gift" or a "loan" we are satisfied that it was Mr. Comeau's money to do with as he pleased, and that advancing that sum in support of his application for union membership meets the requirements of section 1(1)(l) of the Act and provides the requisite confirmation of the written document contemplated by the statute. That being so, there is no error, omission or misstatement on the Form 80 declaration. While it might well have been wiser for the union organizer to note the loan/gift that he had witnessed, (because that might have avoided these proceedings and considerable delay), we do not think that there was anything improper in his failure to do so.

14. There remains a dispute about whether Mr. Luna who was working on the job site at the time that he and Mr. Comeau signed membership cards, was really an "employee". The respondent's alternative argument is that Luna was not an employee but rather some kind of "volunteer", and that therefore, a "one-man bargaining unit" consisting solely of Mr. Comeau is not permitted under section 6 of the *Labour Relations Act*. There is also some argument about the exclusion from the unit of part-time workers. Since, on the agreement of the parties, the Board did not hear their evidence and representations with respect to these issues, the matter will be re-listed for hearing on a date to be fixed by the Registrar. In addition, the Board hereby appoints a Labour Relations Officer to meet with the parties to explore, simplify, or endeavour to effect the settlement of the remaining outstanding issues, without the necessity of a further Board hearing.

2820-87-U United Steelworkers of America, Complainant v. Canadian Feed Screws Manufacturing Ltd. and Chris Vasilev, Respondents

Discharge for Union Activity - Interference in Trade Unions - Union official kissing employer's nose on picket line - Employer striking official in return - Picket line incident not breach of Act - Employer breaching Act by firing two employees, holding a meeting of employees, and asking employees whether they had joined the union

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. G. Wozniak* and *K. V. Rogers*.

APPEARANCES: *Keith Oleksiuk* and *Brando Paris* for the complainant; *T. Churchmuch* and *Chris Vasilev* for the respondents.

DECISION OF THE BOARD; August 12, 1988

1. The complainant in this matter, the United Steelworkers of America ("the union" or "the Steelworkers"), alleges that the corporate respondent Canadian Feed Screws Manufacturing Ltd. ("the company" or "Canadian Feed Screws") and the individual respondent, Chris Vasilev ("the employer"), contravened sections 3, 64, 66 and 70 of the *Labour Relations Act* ("the Act") by terminating the employment of Victor Legaspi and John Tissoon, by the holding of a meeting attended by all employees at which Mr. Vasilev discussed the union and, by amendment granted by the Board at the beginning of the second day of hearing (July 12, 1988), by Mr. Vasilev's assaulting Larry Tapatie, a member of the union's negotiating committee, on the picket line. Dur-

ing his testimony, Mr. Vasilev stated that he had asked some of his employees whether they has signed union cards; we have also considered whether such conduct contravenes the Act.

2. The allegations relating to the terminations and the meeting were initially filed in support of the request under section 8 which the union filed with its certification application on January 15, 1988. In the event, the union enjoyed the support of 66% of the relevant employees and was certified without a hearing as a result of the parties' signing a waiver of hearing. The allegations then proceeded as a separate section 89 complaint. On the first day of hearing, a differently constituted panel made a preliminary ruling only (see decision dated June 30, 1988); evidence and submissions on the merits thus commenced on the second day of hearing before us.

3. Mr. Vasilev is the President and owner of Canadian Feed Screws which has been in operation since November, 1975. On February 8, 1988, the Steelworkers were certified to represent the company's employees (the bargaining unit description was not put before us, but it appears to include the production employees). At that time there were forty-five employees in the unit; at the time of the second day of hearing, there were thirty-seven. Two employees, the subject of this complaint, had been terminated; six other employees, about whom there were neither allegations nor other evidence before us, were laid off. Approximately two weeks prior to the continuation of the hearing, the union began a strike against the company which was still in effect and which gave rise to the allegation of an assault on the picket line the prior Friday, July 8, 1988.

4. The Board's consideration of the allegations in this case are subject to the analysis set out in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, at para. 9:

9. The location of the onus of proof is an important consideration in cases such as this one. The reasons, or reason, behind the discharge of an employee occurring in the context of union activity are best determined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn - either that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is the more probable.

(Also see *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299: "Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct".)

5. The picket line incident occurred when Mr. Vasilev was leaving the plant at or near the end of the day. In his car were three employees who had crossed the picket line to go into work during the strike. At the same time, a van driven by the plant manager, Mike Boris, also containing employees who had crossed the picket line, was in the process of leaving the plant. Both vehicles stopped.

6. Mr. Vasilev's version of events subsequent to that point and the union's version, as testified to by Mr. Tapatie and two other employees who were on the picket line at the time, differ in several aspects. No other witness testified with respect to this allegation on behalf of the respondents. Generally speaking, we prefer the testimony of the union witnesses on this issue. Taking their evidence, and that of Mr. Vasilev, into account, we find that the picket line incident occurred in the following manner.

7. Mr. Vasilev motioned Mr. Tapatie to come to his car; Mr. Tapatie, in turn, motioned

Mr. Vasilev to come to the picket line. Mr. Vasilev did so and pushed his body against Mr. Tapatie's who took up the challenge by giving Mr. Vasilev a strong push which knocked Mr. Vasilev backwards two or three feet. Mr. Tapatie weighs 225 pounds and is a strong man to all appearances. Mr. Vasilev, on the other hand, while shorter and lighter than Mr. Tapatie, is wiry in frame and was a championship boxer in his native Yugoslavia. Mr. Vasilev recovered and stepped up very close to Mr. Tapatie's face. The latter, unable, it seems, to resist the opportunity, kissed his employer's nose. (On this point, we note that Mr. Vasilev told us that Mr. Tapatie bit his nose and permitted us to examine his nose for damage. We were unable to see any scratch or scar whatsoever.) At this point Mr. Tapatie told Mr. Vasilev to "fuck off". It is common ground that Mr. Vasilev then swung at Mr. Tapatie, making contact with the latter's jaw, causing considerable pain and probably dislocation, and knocking his glasses off. Mr. Vasilev returned to his car and it and the van turned around and left the plant property by another exit.

8. There had also been an incident the day before in the union's trailer when Mr. Vasilev and some of the striking employees, including Mr. Tapatie, had engaged in a discussion about the Tyson-Spinks fight. It is not unusual for Mr. Vasilev to regale the employees with stories about boxing. He suggested he could show the employees how strong a punch could be by knocking a cigarette out of Mr. Tapatie's mouth. When this suggestion was rejected, he punched the trailer wall, an action described as "joking" by an employee. The mood in the trailer was described by the union witness as "friendly" and "alright" and Mr. Vasilev's conduct there is not alleged to be nor does it appear to be a contravention of the Act.

9. In considering whether the picket line incident constitutes a violation of the *Labour Relations Act*, we take into consideration the reciprocal frustration and irritation these two individuals feel towards each other, the reciprocal provocation, the Thursday trailer incident and the status of Mr. Tapatie as a high profile union official. We find this altercation occurred between two persons of strong personalities who are not on speaking terms. It does not, however, constitute a violation of the Act. We do not believe that this escalating incident which culminated in a punch by the employer is a threat within the meaning of clause 66(c) or section 70 of the Act or violates any other section of the Act. We emphasize that in reaching this conclusion on the facts of this case, we do not wish to be taken to condone the conduct of either participant. Nor do we wish to be taken to be saying that violence by the employer towards persons on the picket line would not raise a very serious suspicion that it was meant to intimidate those employees. But it must be recognized that incidents do occur between individuals who, although coincidentally on opposing sides in a strike, simply irritate and provoke one another. That is what happened here.

10. The termination of Mr. Legaspi must be assessed in light of the events of January 8th, 9th and 13th. By his own admission, Mr. Vasilev terminated Mr. Legaspi on January 8, 1988, for the sole reason that he joined the union. That is clearly a violation of the Act. Within two hours, he regretted his action and called Mr. Legaspi, apologized and asked him to come back to work. Mr. Legaspi returned. The next day Mr. Vasilev held the meeting, told the employees that he had fired Mr. Legaspi, why and that he had rehired him. Only one week later, the employer fired him again, this time, he says, because Mr. Legaspi was slow and his work not up to standard. Mr. Legaspi was on probation and since Mr. Vasilev needed to cut his workforce, he chose Mr. Legaspi as an employee whom he was not likely to recall and fired him rather than laying him off. On the advice of his lawyer, Mr. Vasilev sent a telegram dated January 29, 1988, to Mr. Legaspi offering him reinstatement and back pay with interest. Mr. Legaspi had another job, where he is still employed, and did not accept the offer.

11. Even accepting that there was some basis in the quality of his work for selecting Mr. Legaspi for termination in light of a slowdown, Mr. Vasilev has not convinced us that he was not

still reacting to the anger and frustration he felt when he found out that Mr. Legaspi joined the union. Nor have we been disabused of our concern that Mr. Legaspi's dismissal and subsequent rehiring were intended as an example to the other employees. On January 7, 1988, on the employer's own words, there was no reason to let him go; yet only a week later, Mr. Vasilev was so sure he would not recall Mr. Legaspi because of the poor quality of his work that he did not lay him off, but fired him. Mr. Vasilev's explanation does not rebut the inference we draw from that sequence of events and we find that Mr. Legaspi's termination constitutes a violation of the Act as being in part motivated by anti-union considerations (see *Pop Shoppe (Toronto) Limited, supra*). We did not have submissions or evidence going to a departure from the Board's normal remedy with respect to terminations for violation of the Act. We therefore direct that the respondents reinstate Mr. Legaspi and compensate him for monies lost through their violation of the Act.

12. The firing of Mr. Tissoon is somewhat more difficult. He was not an active union organizer. Nor was he one of the employees whom Mr. Vasilev questioned about signing a union card, although he might have found out that Mr. Tissoon had signed a card from other sources (there was no evidence that that was in fact the case, however). But it is difficult to avoid the implications of the timing of Mr. Tissoon's termination: the same day as Mr. Legaspi and a mere week after the meeting. Therefore, even though we are satisfied that Mr. Vasilev had concerns about Mr. Tissoon's work, we are not satisfied that the firing of Mr. Tissoon was not intended to show the employees during the union's organizing campaign they were vulnerable to loss of employment. Reinstatement and compensation are appropriate remedies.

13. The day after firing Mr. Legaspi the first time, Mr. Vasilev, after staying at the plant all night to think about the appearance of the union in his plant, called a meeting of employees who were told to go to the cafeteria as they arrived for work at 7:30 a.m. on January 8, 1988. Mr. Vasilev, the owner, and Mr. Boris, the plant manager, both addressed the meeting. The employer says that he wanted to know what he had done wrong; he told us that he no longer felt the sense of betrayal and frustration he experienced when he found out about the union the day before. He said he no longer believed the union was organizing his employees because he was considered a "bad man". In order to find out why the union was organizing, he says, he directed that Trevor Whittaker, one of the main organizers, be called to the meeting from his home where he was on compensation for an injury. Mr. Whittaker, having called the union, went to the meeting but did not arrive until possibly the halfway point.

14. Part of the meeting involved Mr. Vasilev's and Mr. Boris' addressing the employees and part involved the employees' telling him what problems they had in the plant or with their working conditions, such as inadequate ventilation, being deducted half an hour's pay when late, not being paid for coffee breaks, and lack of training, safety concerns and so on. Overall, with respect to the union, the employees were given a mixed message. Mr. Vasilev told them there was no money for a raise in pay, even if the union was successful. He also related a previous conversation in which he had said he would close the plant down if the union was successful, but said he had changed his mind. He explained he had fired a man the previous night - Mr. Legaspi - but then recognized he was wrong and rehired him; he apologized to him again in front of the employees at the meeting. But he also told the employees that he was an immigrant, as it seems, are many of them, and had never joined the union. He made it clear he had put a great deal into his company and suggested that the employees could have him or a union. On the other hand, he said if the union could increase production, he would join it himself (it was pointed out to him that as management, he could not). He informed the employees (incorrectly) that 90% of Canadian businesses are unionized and are successful. He suggested that a union might help them deal with some of their problems, such as deductions when late and unpaid coffee breaks. He made it clear that he had opposed the union in the past and gave an ambiguous message about his feelings as the time of the

meeting. Most importantly, he identified union members such as Mr. Legaspi, and organizers, such as Mr. Whittaker, and required the latter to justify their actions. In our view, the meeting constitutes a violation of the Act as an interference with “the formation, selection or administration of a trade union or the representation of employees by a trade union” under section 64 of the Act. We observe in regard to Mr. Vasilev’s reason for calling the meeting that such motive is irrelevant: “[i]nterference, whether deliberate or inadvertent, whether well-intentioned or ill-intended is interference”: *Nalco Boats Manufacturing*, [1976] OLRB Rep. Nov. 710. We add that the same is true of ambivalent or erratic interference. Similarly, in our view, the conduct must be assessed at the time it occurred and it is irrelevant that the union was able to sign up 66% of the employees: interference does not have to be successful to constitute a violation of the Act.

15. Finally, Mr. Vasilev admitted that he had telephoned employees and asked them if they had joined the union; he asked Mr. Legaspi not only that, but also who the chief organizer was. Subsection 111(1) of the Act protects the confidentiality of records “that may disclose” whether a person is a member of a union or not or wishes to be represented by a union or not; it also states that

no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does not desire to be represented by a trade union.

Underlying the application of subsection 111(1) is the Legislature’s intent to safeguard the identity of persons who support the union and the identity of persons who oppose the union. Employees’ belief that their preference is free from scrutiny by either the employer or the union is integral to the free choice with respect to union representation contemplated by the Preamble to the Act. The significance of that protection is obviously lost if employers may ask employees whether they have joined.

16. Counsel for the respondents conceded that Mr. Vasilev’s asking employees whether they had signed a union card, constituted a violation of the Act, but argued we should not find a violation because the union had not alleged such a violation and because the information gained was “not used to the detriment of any employee in the unit”. Since Mr. Vasilev voluntarily admitted that he had made the calls, the failure of the union to make the specific allegation is not an issue. As for whether the information was used to the detriment of the employees, Mr. Legaspi found himself fired solely for that reason and even though he was rehired, neither he nor any other employees, could be sure that once Mr. Vasilev had time to consider the matter again, the same thing would not recur. In any case, in our view, the mere asking of employees whether they had signed a union card, regardless of the answer or the effect, constitutes a violation of the Act.

17. On the basis of the foregoing, the allegations that the respondents violated the Act with respect to the picket line incident are dismissed. Also on the basis of the foregoing, we declare that Chris Vasilev and Canadian Feed Screws Manufacturing have violated sections 64, 66 and 70 of the Act by the firing of Victor Legaspi on January 13, 1988; the firing of John Tissoon on January 13, 1988; the holding of the meeting on January 8, 1988; and by Mr. Vasilev’s asking employees whether they had joined the union.

18. We hereby direct that the respondents

(a) cease and desist from contravening sections 64, 66 and 70 of the Act;

(b) reinstate and compensate Victor Legaspi and John Tissoon for all lost wages and benefits sustained by them as a result of his firing on January 13, 1988, with interest thereon in accordance with Practice Note 13;

(c) permit the Union to hold a meeting with the employees in the bargaining unit in the cafeteria of the corporate respondent, within two weeks of this decision, such meeting to be held for a period of one hour during each shift without interference by or the presence of the respondents, including any member of management;

(d) post copies of the attached notice, marked "Appendix" after being duly signed by Chris Vasilev, on behalf of himself and the corporate respondent, in conspicuous places on the premises of the corporate respondent, for a period of sixty days, take reasonable steps to ensure the notices are not altered, defaced or covered with other material and give a representative of the union reasonable access to the premises for the purpose of ensuring the respondents have complied with this posting requirement.

19. We remain seized with respect to the amount of compensation owing Mr. Legaspi and Mr. Tissoon if the parties cannot reach an agreement.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD IN WHICH THE BOARD FOUND THAT WE HAD VIOLATED THE ONTARIO LABOUR RELATIONS ACT BY FIRING VICTOR LEGASPI ON JANUARY 7, 1988 AND JANUARY 13, 1988, BY FIRING JOHN TISSOON, BY ASKING EMPLOYEES WHETHER THEY HAD SIGNED UNION CARDS AND THE IDENTITY OF UNION ORGANIZERS AND BY HOLDING THE MEETING OF EMPLOYEES ON JANUARY 8, 1988.

ALL EMPLOYEES ARE GIVEN THESE RIGHTS BY THE LABOUR RELATIONS ACT:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OF THESE THINGS;

TO REFUSE TO DIVULGE TO ANYONE, INCLUDING THEIR EMPLOYER, WHETHER THEY HAVE SIGNED A UNION CARD OR TO DIVULGE TO ANYONE, INCLUDING THEIR EMPLOYER OR THE UNION, WHETHER THEY OPPOSE THE UNION.

WE ASSURE OUR EMPLOYEES THAT:

WE WILL NOT INTERFERE WITH THESE RIGHTS;

WE WILL REINSTATE VICTOR LEGASPI AND JOHN TISSOON AND PAY COMPENSATION TO THEM FOR THE LOSSES THEY SUSTAINED WHEN WE VIOLATED THE ACT;

WE WILL PERMIT THE UNION TO ENTER THE PLANT IN ORDER TO HOLD A MEETING WITH THE EMPLOYEES IN THE CAFETERIA FOR A PERIOD OF ONE HOUR ON EACH SHIFT WITHIN TWO WEEKS OF THIS DECISION WITHOUT ANY MEMBER OF MANAGEMENT BEING PRESENT OR INTERFERING IN SUCH MEETINGS.

CANADIAN FEED SCREWS MANUFACTURING LTD.

PER: _____
PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 12TH day of AUGUST, 1988.

0622-88-R Labourers' International Union of North America, Local 1059, Applicant v. Capital Construction Corporation, Respondent

Certification - Construction Industry - Reconsideration - Respondent seeking reconsideration of decision issuing certificates on ground that employees left respondent's employ subsequent to application date - Board not reconsidering a finding of fact on basis of events occurring subsequent to dates material to the Board's considerations - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

DECISION OF THE BOARD; August 2, 1988

1. By decision dated June 30, 1988, the Board issued two certificates: one to the applicant on its own behalf and on behalf of all other affiliated bargaining agents of the affiliated bargaining agency thereof (that is, the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council) in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and another to the applicant with respect to all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2. By letter dated July 11, 1988, the respondent, in effect, seeks reconsideration of the Board's decision as follows:

I feel that the decision of the Board on June 30, 1988 was made without full familiarity with the facts. One of the employees making application, Colin Gould, was laid off due to shortage of work on June 8, 1988; having been the most recently hired employee. The second employee making application, Peter Evitts, was dismissed on June 22, 1988 for drinking on the job. We now have only one employee who has not applied for membership in the union.

The Labourers' International Union of North America, Local 1059, does not represent anyone's interest at Capital Construction Corporation. I respectfully request the Board's decision be reviewed and this union be de-certified as the bargaining agent.

3. Section 106(1) of the *Labour Relations Act* provides that:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The Board's power to reconsider its decision is a broad one. However, both the Act and the realities of labour relations dictate that the premise from which the Board must begin is that its decisions should be final and conclusive for all purposes. In recognition of the need for finality, the Board will not usually reconsider a decision unless an obvious error has been made; or, the request raises important issues of Board policy; or, the party requesting it proposes to adduce new evidence that it could not, with the exercise of due diligence, have obtained previously, and that new evidence would be virtually conclusive; or, if a party wishes to make representations or objections

it had no previous opportunity to make (see Board Practice Note No. 17). The Board has entertained applications for reconsideration alleging that events that occurred subsequent to a Board decision have so altered the situation that an order of the Board is clearly inappropriate (see for example *The Journal Publishing Co. of Ottawa Ltd.*, [1977] OLRB Rep. Sept. 549 and Nov. 748; *Culverhouse Foods Ltd.*, [1978] OLRB Rep. Mar. 219). However, it does not appear that the Board has ever reconsidered a finding of fact or, other than perhaps in *Genaire Ltd.*, 59 CLLC ¶18,140 or *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. Feb. 158, its disposition in a representation proceeding on the basis of events that occurred subsequent to dates material to the Board's considerations. It is difficult to imagine any situation where it would be appropriate for the Board to reconsider such findings or dispositions, as opposed to remedial orders in representation proceedings on the basis of subsequent events (even in *Atlantic Packaging Products Ltd.*, *supra*, the Board reconsidered its decision to certify a trade union not because of the build-up in the employer's work force that occurred subsequently, but because the parties knew, on the date of application, that the build-up was planned and imminent and because, had that plan build-up and been brought to the Board's attention, a certificate would not have been issued). The fluid nature of labour relations is such that changes and circumstances are common, particularly in the construction industry. A less stringent approach to reconsideration than the Board has adopted would result in a lack of finality and certainty that would have a serious destabilizing effect on the labour relations of this province. This is particularly true of Board decisions, such as that which the respondent seeks to have the Board reconsider which certify a trade union as the bargaining agent for a group of employees.

4. The certification process and the manner in which the Board determines the right of an applicant trade union to be certified, in other than the construction industry, is well established and has been described by the Board in a number of previous decisions (see for example, *London Soap Company Limited*, [1987] OLRB Rep. Feb. 241 at paragraph 12; *Famz Foods Limited*, [1985] OLRB Rep. June 857 at paragraphs 10 to 14; *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15 to 17). Although all applications for certification in the construction industry must be made under section 144 of the Act (see *Clarence H. Graham Construction Ltd.*, [1981] OLRB Rep. Sept. 1195) and the method of ascertaining the list of employees in the bargaining unit for purposes of the count (that is, the number of employees in the bargaining unit for whom the applicant has filed membership evidence) differs, the same general considerations apply.

5. In applications for certification in the construction industry, a person must be at work, in the bargaining unit for the majority of his/her time, for the respondent employer only on the date the application is made in order to be included on the list of employees for purposes of the count. Accordingly, it is irrelevant that any person so engaged was not at work in a bargaining unit, or employed by the respondent, on any day prior or subsequent to the date of application (see *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *E & E Seegmiller Ltd.*, [1987] OLRB Rep. Jan. 41; *Smiths Construction Arnprior Limited*, [1984] OLRB Rep. Mar. 521).

6. In our view, the respondent, which originally filed a list of employees but no reply or other representations, has suggested no cogent basis for its request that the Board's reconsider its decision to issue certificates as aforesaid, or offered any reason for the Board to hold a hearing with respect to its request. Accordingly, the respondent's request for reconsideration is denied and the decision dated June 30, 1988 herein is affirmed.

0424-88-R; 0658-88-U United Brotherhood of Carpenters' and Joiners of America Local Union 27, Applicant v. 704039 Ontario Limited, carrying on business as **Construction 2000**, Respondent v. Labourers' International Union of North America, Local 183, Intervener v. Group of Employees, Objectors; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. 704039 Ontario Limited, carrying on business as Construction 2000, Respondent

Certification - Construction Industry - Natural Justice - Practice and Procedure - Board required to determine whether collective agreement bar to certification application - Board receiving *viva voce* and documentary evidence on that issue but insufficient time to receive oral submissions - Written submission requested - Intervener objecting to being deprived of opportunity of making oral submissions - Board considering factors such as its power to determine its own practice and procedure, the parties having had the opportunity of presenting witnesses, and expedition - Board ordering that written submissions be filed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *M. Eayrs* and *H. Kobryn*.

APPEARANCES: *J. David Watson* and *Joe Almeida* for the applicant/complainant; *B. L. Mendrycki* for the respondent; *J. Sack* and *Tanya Lee* for the intervener; *Jeff Robinson* and *Rocco Urlando* for the objectors.

DECISION OF THE BOARD; August 11, 1988

1. The name of the respondent in Board File No. 0424-88-R is amended to read: "704039 Ontario Limited, carrying on business as Construction 2000".

2. File No. 0424-88-R is an application for certification made on May 12, 1988 by the United Brotherhood of Carpenters' and Joiners of America Local Union 27. Labourers' International Union of North America, Local 183 filed an intervention to this application on July 13, 1988. Local 27 also filed a complaint under section 89 of the *Labour Relations Act* alleging that 704039 Ontario Limited, carrying on business as Construction 2000 has violated sections 64, 66 and 70 of the Act. Both files were scheduled for hearing by the Board on July 21, 1988. The notices of hearing in each file gave the following purposes for the hearing:

File No. 0424-88-R

...to receive the evidence and representations of the parties respecting all matters arising out of and incidental to the application, including the weight, if any, to be given to the statements contained in the respondent's letter dated May 27, 1988.

File No. 0658-88-U

...considering the evidence and representations of the parties with respect to all matters arising out of and incidental to the complaint filed under Section 89 of the *Labour Relations Act*.

3. At the hearing, the Board accepted the agreement of the parties that an alleged collective agreement between Local 183 and Construction 2000, if proven to be a collective agreement which satisfied the provisions of the Act, would be a bar to the application for certification and, therefore, that the Board should first hear and decide that issue. Accordingly, the Board received the *viva voce* and documentary evidence of the parties on that issue, but insufficient time remained to receive the parties' oral submissions. The Board's suggestion that written submissions might expedite the disposition of these matters, particularly since the issue was a threshold one which

could be determinative of both files, counsel for Local 183 objected to being deprived of the opportunity of making oral submissions. The Board reserved its decision and, in the alternative that the Board should direct submissions be made in writing and should find that there is no collective agreement bar, or that the Board should receive oral submissions, the Board directed that hearing into these matters be continued on October 31, November 8 and 9, 1988.

4. The Board has reviewed and weighed the submissions of the parties and has decided to direct the parties to make their submissions in writing on the threshold issue of whether the alleged collective agreement between Local 183 and Construction 2000 is a bar to the application for certification in File No. 0424-88-R. In so doing, the Board has considered the parties' submissions and the following factors:

- (1) The Board's discretion under subsection 102(13) of the Act to "...determine its own practice and procedure..." subject to the parties having "...full opportunity to present their evidence and make their submissions,...".
- (2) The fact that the parties have had the opportunity in a hearing before the Board to be represented by counsel or agent, call and examine witnesses and cross-examine witnesses contrary in interest.
- (3) That it would serve best the interests of labour relations for the employees, the two trade unions and the employer to know at the earliest possible date what collective bargaining relationship, if any, would govern the employment relationship between Construction 2000 and its employees affected by the application for certification and the complaint.

Since a finding that there is a collective agreement bar would result in the dismissal of the application for certification and a request from Local 27 to withdraw its section 89 complaint, it would be in the best interests of all parties to have that issue decided as quickly as possible. If the Board should find that there is no collective agreement bar, the parties would know with certainty that they would have to prepare to meet the issues remaining in the two files. In the Board's view and in all the circumstances of these proceedings, directing the making of written submissions is a reasonable balance between the competing interests of having an opportunity to make oral submissions and the need for expedition in labour relations matters.

5. Accordingly, the Board directs that the parties make their written submissions to the Board as follows:

- (1) Local 183's submissions-in-chief shall be filed with the Board and a copy served on each of the other parties on or before September 2, 1988;
- (2) Local 27's submissions shall be filed with the Board and a copy served on each of the other parties on or before September 19, 1988;
- (3) the submissions of Construction 2000 shall be filed with the Board and a copy served on each of the other parties on or before September 19, 1988;

- (4) the submissions of the objectors shall be filed with the Board and a copy served on each of the parties on or before September 19, 1988;
- (5) should any of the parties in items (2), (3) and (4) file its submissions with the Board and serve a copy on the other two parties as directed herein, each party so served shall file any further submissions with the Board on or before September 26, 1988, and at the same time serve a copy on each of the other two parties and on Local 183; and
- (6) Local 183's submissions in reply, if any, shall be filed with the Board and served on each of the other parties on or before October 3, 1988.

6. For the purposes of service the addresses of the parties are as follows:

- (1) United Brotherhood of Carpenters' and Joiners of America Local Union 27

Jesin & Watson
Barristers and Solicitors
4580 Dufferin Street
Suite 204
North York, Ontario
M3H 5Y3

- (2) Labourers' International Union of North America, Local 183

Sack, Charney, Goldblatt & Mitchell
Barristers and Solicitors
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8
Attention: Mr. L. A. Richmond

- (3) 704039 Ontario Limited, carrying on business as Construction 2000

10 Livonia Pl.
Unit #89
Scarboro, Ontario
M1E 4W6

- (4) Objectors:

Mr. Jeff Robinson
18 Burritt Road
Scarborough, Ontario
M1R 3S6

3136-87-U and 3137-87-R United Food & Commercial Workers International Union, Local 617P, Complainant/Applicant v. Crown Packers & Realities Ltd., Crown Meat Packers Limited, Crown Dressed Meats Inc., Respondents

Sale of a Business - Employer with established meat packing business acquiring a federally inspected plant and assets from trustee in bankruptcy - Bad will associated with predecessor employer due to allegations of selling tainted meat - Plant seven times larger than required - Employer having hope of expanding his business - Services of predecessor's plant manager retained - Few customers acquired - Board analyzing sale jurisprudence and finding no sale of a business - Subsequent failure of a business after it has been acquired need not negate a finding that there has been a sale of a business - Mere intention to acquire a business will not necessarily result in a declaration - Transfer of a federally inspected plant not analogous to "transfer of a licence" cases - Key elements of wholesale meat packing business are entrepreneurial ability and customer base - Application dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *T. Meagher* and *D. Wozniak*.

APPEARANCES: *Michael Mitchell*, *Tanya Lee* and *Steve Szuba* for the complainant/applicant; *R. C. Fillion* and *Lou Levine* for the respondents.

DECISION OF THE BOARD; August 8, 1988

1. By agreement of the parties Crown Meat Packers Limited and Crown Dressed Meats Inc. are added as respondents to this application.

2. This is an application pursuant to section 63 of the *Labour Relations Act* ("the Act"). Local 617P of the United Food and Commercial Workers International Union alleges that the respondents are successor employers to Royal Dressed Meats Inc. The applicant has also filed a concurrent application pursuant to section 89 of the Act in which it alleges that the respondents have violated sections 64, 66, 70 and 50 of the Act (Board File No. 3136-87-U). The thrust of the section 89 complaint is that the respondents have failed to recognize the union, have failed to apply the terms and conditions of the collective agreement between the trade union and the predecessor employer Royal Dressed Meats Inc., and have bargained with and agreed to terms and conditions with individual employees which are different than the terms and conditions of that collective agreement. At the hearing into these matters, the parties agreed that in the event that we determine that a sale of a business within the meaning of section 63 of the Act has occurred, and the respondents are found to be the successor employer, this Board remain seized to deal with the section 89 complaint and the issue of remedy including compensation for the respondents' failure and refusal to recognize the applicant or adhere to the terms and conditions of the collective agreement. The corollary to that is if the Board finds that a sale of a business within the meaning of section 63 of the Act has not occurred, in the circumstances of this case, the Board cannot then find any violations of the *Labour Relations Act* and the section 89 complaint should be dismissed.

3. The only witness to testify during the course of the hearing was Mr. Louis Levine. The parties were able to agree upon certain facts which obviated the need for *viva voce* evidence. The Board found Mr. Levine to be a credible witness who gave his evidence in an open and forthright manner. In making our findings of fact as set forth herein, we have considered the usual factors including the consistency of Mr. Levine's evidence, his demeanour while testifying, his responses in cross-examination, his ability to resist the influence of self-interest to modify his recollection and

what appears to be reasonable probably when the circumstances, his testimony and the agreed upon facts are considered. Our findings of fact are as follows.

4. Mr. Levine is the President, Chief Executive Officer and Chief Operating Officer of Crown Packers and Realities Ltd. ("CPR"), Crown Meat Packers Limited ("CMP") and Crown Dressed Meats Incorporated ("CDM"). He also owns all the shares of each of these companies. CPR was established in 1979. For purposes of this application it is sufficient to note that this company signed the offer to purchase the property and assets of Royal Dressed Meats Inc. ("RDM") from the trustee in bankruptcy. CMP was incorporated in 1978 and was Mr. Levine's operating company until January 1988. It was CMP which ultimately purchased the assets of RDM from the trustee. CMP owns the rolling stock, pays the bills for the operation of the plant and is, generally speaking, the company used by Mr. Levine to operate the plant and the property. CDM was incorporated in December 1987. From February 1988 to the present this company has continued the meat wholesale operations previously operated by CMP. When asked in cross-examination as to the purpose of setting up this third company, Mr. Levine indicated that it was designed to keep the physical assets separate from the operation of his meat wholesale business.

5. Mr. Levine through his various companies has been in the wholesale meat packing business for the past ten years. As a wholesale meat packer, Mr. Levine purchases live stock, arranges for it to be killed and, after delivery of the slaughtered livestock cuts the meat, processes it into wholesale sizes and then sells it to retailers. Originally he operated from leased premises at Toronto Abattoirs. Toronto Abattoirs leased to Mr. Levine the space which he needed to hold product from the time of receipt, through the processing stage, until it was ultimately shipped to the retailer. In the wholesale meat packing business in which Mr. Levine engages when a company "leases" facilities, it generally leases "rails" in a cooler. The "rails" refer to the railing equipment in the cooler from which slaughtered livestock hangs. Federal regulations determine the positioning of the rails. Rails must meet government specifications as to height above floor level and the width of space between the rails. In addition to providing two "rails", Toronto Abattoirs also slaughtered the livestock. As the livestock was custom killed for Mr. Levine he required neither the space nor the equipment normally associated with a slaughter house or abattoir. Toronto Abattoirs charged a per head fee for each animal slaughtered. In addition to the "rails" in the cooler and the loading dock which accompanied the rental of such rails, the only equipment needed to operate a wholesale meat packing business are breaking saws to break the carcass of the slaughtered livestock, vacuum packing equipment, scales, rolling stock for deliveries, office equipment for the administrative duties associated with the operation of the business and supplies including paper, boxes and other packaging supplies. This equipment was owned by Mr. Levine.

6. In December 1979 Mr. Levine transferred his operations from Toronto Abattoirs to The Beef Terminal which is also situated in Toronto. The Beef Terminal leases "rails" to a number of other operators in the wholesale meat packing industry and is a similar facility to the facility owned by Toronto Abattoirs. At the Beef Terminal Mr. Levine leased six rails. Mr. Levine's livestock was custom killed at the Beef Terminal and a per head, per kill fee was remitted to the Beef Terminal.

7. As a result of a series of events which need not be detailed here, Mr. Levine determined to leave The Beef Terminal. He started to look for alternative sites from which to continue his operations. In October 1987 Mr. Levine saw an advertisement which had been placed in the *Globe & Mail* by Thorne, Ernst & Whinney in its capacity as trustee in bankruptcy of RDM. The advertisement offered for sale the real estate, equipment and supplies of the federally inspected boxed beef processing plant; specified that "en block" offers would be given special consideration; and referred to these assets as comprising a "turn key operation". Interested persons were asked

to contact one of two named individuals for further information and/or an appointment to view and to submit written proposals on or before Thursday, October 23, 1987.

8. After he saw the advertisement, Mr. Levine contacted Mr. Dan Girardi one of the two named individuals. He subsequently attended at the property, inspected the property and the plant, received an information package which contained greater details of the property, the plant and its equipment, and eventually put in an offer to purchase. This offer was rejected when the trustee accepted a higher offer from a different bidder. Mr. Levine however maintained contact with Mr. Girardi. His persistence eventually enabled him to put in a subsequent offer to purchase, which was accepted. This situation arose when the initially successful bidder was unable to arrange suitable financing and the trustee reopened the matter for new bids. By agreement dated November 27, 1987, CPR agreed to purchase "all of the trustees interest and all property and assets of Royal Dressed Meats Inc."

9. It is important to outline in some detail what was acquired by Mr. Levine as a result of this transaction. The property itself is a plant located on 6.97 acres of land. Its municipal address is 556 Speedvale Avenue West in the City of Guelph. As it developed some importance at the hearing, as discussed below, it is relevant to note that the property is subject to two types of zoning. One portion of the property is zoned M1. The initial newspaper advertisement refers to the property in the following manner, "the plant is located on 6.97 acres of land, a substantial portion of which could be severed as prime industrial/commercial/residential land without impacting on the existing operation."

10. In addition to the land, Mr. Levine also acquired the building situated on the land, and the machinery, equipment and vehicles of RDM. The building itself is a free standing building consisting of plant and office space of approximately 25,000 square feet. The list of equipment and supplies required are extensive and need not be detailed here. It is sufficient to note that the equipment and supplies required are sufficient to enable a person to immediately commence a wholesale meat packing business. Some of the equipment purchased is of the same or similar nature to the equipment leased by Mr. Levine at The Beef Terminal. Some of the equipment is superfluous to the respondents' operation. For example, although the plant has a kill floor area, the respondents' operation does not require such an area. Another unrelated corporate entity continues to custom kill livestock for the respondents. Finally, some of the equipment is redundant as it is equipment of the same or similar type as equipment already owned by Mr. Levine i.e., the rolling stock.

11. Mr. Levine candidly and readily admitted both in examination-in-chief and in cross-examination that the property, plant and equipment was much more than he required to operate his business. He testified however that he did hope to expand and increase his operations to double the size of his operations at The Beef Terminal in Toronto. He testified that he purchased the property as an investment and indicated that he could sever and sell that portion of the property which he does not need to operate the business. That portion of the property is zoned M1. Mr. Levine was of the opinion that its sale alone would net him a profit. In this regard, he testified that the next highest bid to his came from a real estate development company which had no connections to the meat packing business. That company's bid was not substantially lower than his own. An inference can be drawn that the land in and of itself, irrespective of the meat packing business situated upon it, is an extremely valuable commodity.

12. Notwithstanding the fact that the plant and equipment which he acquired were sufficient to operate a meat packing company approximately seven or eight times the size of his, Mr. Levine has not sold or otherwise disposed of any of the equipment in the plant. In his view to sell isolated assets would not necessarily make good business sense. It is his opinion that the sale value of the

assets are insufficient to warrant their immediate disposal and the assets are of greater value to him to retain as spares or as a source for replacement parts in the event the equipment he does use breaks down. Mr. Levine has considered leasing the office facilities attached to the plant as fully furnished offices, but to date has not acted upon this opportunity citing the fact that he has only owned the facility for less than six months and at present is primarily concerned with establishing the meat packing business.

13. Mr. Levine commenced operations at the Speedvale Avenue location towards the end of January 1988. We have purposely used the neutral term "commenced operations". Counsel for the respondents argued that Mr. Levine did not commence operations but rather than he transferred his pre-existing business from one facility in Toronto to a different facility in Guelph. On the other hand, counsel for the union argued that the business which Mr. Levine commenced to operate in Guelph in January 1988 was the business that he had acquired from RDM through the trustee in bankruptcy. Those divergent arguments necessitate us to review in some detail the business which was carried out in Guelph by RDM, the business of the respondents as it existed at The Beef Terminal in Toronto, and the operations carried out by the respondents since acquisition of the plant and equipment in January 1988.

14. While operating from The Beef Terminal location in Toronto, Mr. Levine employed three full-time employees and one employee who worked only half days. In Toronto the company processed approximately 100 to 150 livestock per week. When he operated his business in Toronto, Mr. Levine arranged for his livestock to be custom killed at The Beef Terminal. Operating from Toronto Mr. Levine's customer base consisted of the small independent butchers who owned/operated their own shops. Mr. Levine developed his business through continuous, personal contact with customers and the development of one-to-one relationships typical of the independent entrepreneur.

15. Now that the company is operating from the Guelph location, Mr. Levine arranges for the livestock to be custom killed by a company called M.G.I. Packers in Kitchener. There is no relationship, corporate or otherwise between M.G.I. and the predecessor employer RDM. Similarly, save for the contractual relationship which governs the slaughtering of livestock, there is no relationship between M.G.I. and the respondents. For running the Guelph operation, in addition to himself and his wife, Mr. Levine also employs a London, Ontario based salesman, a driver/manager, a plant manager, a plant engineer and some manual labour. There has been turn-over in the manual labour as two labourers who had been employed by Mr. Levine in Toronto and who continued to work for the company in Guelph terminated their employment prior to the hearing. Similarly, one person who had been employed by the predecessor employer RDM was temporarily employed by Mr. Levine but quit after one week. At present, two former RDM employees are employed as manual labourers by the respondents.

16. The London based salesman has been employed by the respondents for approximately three years. Similarly the driver/manager has been an employee for the past eight years. Both the plant manager and the plant engineer however joined the respondents' work force upon the commencement of operations in Guelph. Both individuals had previously been employees of RDM.

17. The Guelph operation processes approximately 50 to 70 livestock per week. The respondents' customer base continues to be the small, independent butcher although the exact composition of that customer base has undergone some fluctuation. Mr. Levine testified that he lost some business when he ceased to operate in Toronto and acknowledged that he has picked up some new customers when he commenced operations in Guelph. On balance however, it would appear that, at least up to time of this hearing, the business of the respondents had suffered a down

turn as a result of the move to Guelph. Mr. Levine however stated that it is still too early to tell, he expects business to improve and that growth will take time.

18. The predecessor employer RDM was a much larger employer than the respondents. RDM employed approximately 50 to 60 employees and processed approximately 800 livestock per week. The typical RDM customers were the major chain supermarkets such as Oshawa Foods, including IGA, Loblaws and A & P. Mr. Levine estimated that over 95% of the volume processed by RDM was destined for these major customers. It was Mr. Levine's opinion that the meat packing "business" of RDM was substantially different than the meat packing "business" in which he engaged. As a result the skills and expertise of the employees employed by RDM was different than the skills and expertise of the respondents' employees. RDM concentrated on high volume sales, and as a result that company's approach to its customers, the transportation of its goods, and the type of cuts it specialized in were different from the methods used by the respondents in preparing, cutting and packaging its product. Mr. Levine estimated that because of the difference in the size and type of the business of RDM, he is only using approximately one half of the plant previously operated by RDM.

19. The principals of RDM were Dee Ferraro, Angie Ferraro, John Ferraro and Milo Shantz. These persons also owned Consolidated Beef in Kitchener, Ontario. The factors which led to the eventual demise of RDM and Consolidated Beef included the revocation of the company's license to slaughter livestock as a result of allegations that the company had increased "kill" charges by falsifying actual weights of the cattle killed, the eventual restoration of that license after strict controls were established, the laying of criminal fraud charges against certain principals of the company as a result of ongoing investigations, and the bad publicity generated both by the criminal charges and allegations that the company had sold tainted meat. The exact reasons for, or details of, the demise of the company need not be explored in depth. It is relevant and important to note however that the news of the troubles and adverse publicity that plagued RDM were generally known in the meat packing industry before Mr. Levine first offered to purchase the plant in October 1987.

20. By January 1988, any goodwill associated with either the name Royal Dressed Meats, the plant location in Guelph, or the name Ferraro had gradually dissipated. Mr. Levine testified that when he commenced operations in January 1988 the plant had been vacant for approximately six months RDM having vacated the premises in the first or second week in July. Not only was there an absence of goodwill in either the name Royal Dressed Meats, the plant location or the name Ferraro, it was Mr. Levine's testimony that there was "bad" will associated with those aspects of the predecessor business. As a result Mr. Levine poured both time and energy into the task of disassociating himself from RDM and its principals. To do this he carried out an active solicitation campaign of new customers in which he attempted to sell both himself and his company and its history. Mr. Levine also took such outwardly visible signs of disassociation as the removal of all distinctive lettering, signs or logos on either the building or the trucks which he had acquired. The respondents did not acquire RDM's customer list, logos or trademarks. The Agreement of Purchase and Sale does not provide for any transfer of accounts receivable, (which at the date of receivership equalled approximately 4.5 million), existing contracts, nor does it provide for a transfer of goodwill. The agreement does not contain a covenant not to compete nor does it contain any other provision designed to assist the respondent in carrying out the business of wholesale meat packing. On its face the Agreement of Purchase and Sale is limited strictly to a sale and purchase of assets. Neither the principals of RDM nor anyone associated or related to that company were involved in the financing of the acquisition of these assets by the respondents. The financing for the transaction came from Mr. Levine's own personal resources and through ordinary commercial sources such as a chartered bank.

21. Notwithstanding these factors, there are some factors which, for lack of a better word, "link" together RDM and the respondents. These factors, to the outside observer might be seen to associate either the business or the principals of RDM with the business and principal owner of the respondents. Not only did Mr. Levine acquire the entire plant and equipment of RDM and thereby operate from the same premises using the same equipment, he also continued to employ two of RDM's managerial employees. Mr. Levine testified he continued the employment of the plant engineer who had also been retained by the trustee in bankruptcy upon the recommendation of the trustee in bankruptcy. More importantly however he also retained the services of Mr. John Ferraro.

22. John Ferraro was the plant manger of RDM. He was also a Vice-President and Director of RDM and one of its shareholders. He is the son of one of the other principals of RDM. Mr. Levine testified that he did not know John Ferraro before he entered into the Agreement of Purchase and Sale in November 1987. The Agreement of Purchase and Sale was not contingent upon the respondents acquiring the services of John Ferraro nor was it contingent upon having John Ferraro participate in the operations of the respondents.

23. The catalyst which brought together Mr. Ferraro and Mr. Levine was a somewhat unique, mutual business need. It is necessary to set out in some detail the nature of the relationship which came about between the two men. After Mr. Levine entered into the Agreement of Purchase and Sale he had some discussions with the trustee about his need to find competent, qualified personnel to assist in the running of the plant. Although Mr. Levine had been in the meat packing business for ten years, he had never had to concern himself with the physical operation of the plant. Having always leased the premises he did not have to concern himself with the running of a physical plant or its maintenance as that was left to the landlord. Upon the acquiring the Speedvale Avenue property however, Mr. Levine became his own landlord and thereby assumed responsibility for many matters about which he had not been previously concerned. In addition, as has already been noted, the Speedvale plant is large enough to accommodate a business seven or eight times the size of the respondents'. Mr. Levine discussed this matter with the trustee who in turn recommended that Mr. Levine speak with Mr. Ferraro. Although Mr. Ferraro, as one of the principals of RDM had also been subject to the investigations, had also faced criminal charges, the allegations of selling tainted meat and the bad publicity surrounding RDM, the trustee was of the opinion that John Ferraro was an innocent victim of circumstances who had been unfairly and improperly drawn into the matter.

24. Mr. Levine and Mr. Ferraro had several meetings during December, 1987 and January, 1988. During the course of those meetings Mr. Ferraro outlined to Mr. Levine a business plan which he had developed. Central to that plan was a new process of preparing retail ready cuts of meat through the use of a specific vacuum packaging machine and the preparation of the meat. The meat is cut, packaged in retail ready portions at the plant and transported directly to the retailer for immediate sale to the ultimate consumer. In this way the intermediate step in which a butcher at the retail level cuts carcasses into smaller retail portions is eliminated. Mr. Ferraro is the only person in Canada to develop this concept and purchase the required vacuum packaging equipment although the concept has been marketed in the U.S.A.

25. Mr. Levine was sufficiently impressed with Mr. Ferraro and the concept of retail ready meats that the two men quickly came to an agreement. Mr. Ferraro needed space in a federally inspected meat packing plant in order to develop and promote his concept. Mr. Levine had excess space which he was prepared to provide to Mr. Ferraro and eventually agreed to give Mr. Ferraro access to the premises, and the middle cooler in the plant together with an office on the first floor. In providing this space Mr. Levine's motives were not altogether altruistic. Mr. Ferraro assumed

that if his concept took off, as he expected it would, he would soon be in a position to purchase approximately 50 head of cattle per week from Mr. Levine. Mr. Levine would thereby have an immediate captive customer. If Mr. Ferraro's business became very successful, Mr. Levine might expect to ride on its coat tails. He had an opportunity to get in on the ground floor of a new enterprise.

26. Mr. Ferraro had the requisite expertise to assist in the running of the plant and to instruct Mr. Levine in the plant operations until Mr. Levine felt himself sufficiently capable of assuming these duties and responsibilities. Although initially Mr. Ferraro would spend a lot of time helping in the operation of the plant, as Mr. Ferraro's own business grew and became more successful he would devote less and less of his time helping Mr. Levine and the respondents' companies. By that time however Mr. Levine would be able to handle matters on his own. Mr. Levine wanted to make use of Mr. Ferraro's technical skills and expertise but testified that he did not expect Mr. Ferraro to help the respondents' business through customer contacts, or business connections or know how of the predecessor's business operations. On January 29, 1988 the two men entered into an agreement which specified *inter alia* Mr. Ferraro's right to access to the premises and which obligated CDM to employ Mr. Ferraro for one year at a weekly salary of \$700.00. The agreement is silent in respect of Mr. Ferraro's obligation to buy any livestock from CDM notwithstanding the fact that Mr. Ferraro's potential as a captive customer was one of the benefits which Mr. Levine sought from the relationship.

27. Mr. Levine testified that the agreement was entered into in order to assist Mr. Ferraro to obtain a bank loan to purchase the vacuum packaging machinery. He further testified that the agreement was not written in stone and that changes and amendments have been made informally as matters developed. In fact, matters have not developed. Mr. Ferraro's business is struggling and neither Mr. Ferraro nor Mr. Levine's expectations in respect of the number of livestock which Mr. Ferraro would purchase from CDM have been met. The success has not materialized and in early May, 1988 Mr. Levine advised Mr. Ferraro that he would not continue to make the salary payments specified in the agreement beyond May 30, 1988. Mr. Ferraro's last salary payment for CDM was on May 27, 1988. He still continues to occupy space at the Speedvale premises although a decision as to his continued use of that space will soon be made. Mr. Ferraro's continues to operate his company known as Retail Ready Beef. Mr. Levine has no interest in that company.

28. Finally, reference must be made to a number of other facts disclosed in the evidence before we turn to examine the Board's jurisprudence and the submissions of counsel. Mr. Levine testified that it was important to him that the Guelph plant was a federally inspected plant. He had always operated from a federally inspected plant. His customers base had been built upon the fact that he operated from a federally inspected plant. In addition we note that if a federally inspected plant discontinues operations for more than a year it is automatically re-evaluated and is inspected and expected to conform to current standards. The legislation which regulates the inspection and licensing of meat packing plants does however contain a "grandfather" clause which apparently permits continued operations of federally inspected plants which do not necessarily meet current standards provided that such plants have not been vacant for twelve or more months. It was therefore imperative for Mr. Levine to purchase or lease a federally inspected plant that had not been vacant for more than a year in order to avoid the anticipated costs associated with bringing a plant up to current standards.

29. The parties were able to agree that the marketing business of RDM was approximately 70 million dollars per year (this figure includes the marketing business of Consolidated Beef an associated company). Approximately four or five per cent of that 70 million per year business came from the same type of meat packing business as the meat packing business of CDM. We received

in evidence both an accounts receivable list of RDM as of July 21, 1987, and a customer list of CDM as of June 4, 1988. A review of those lists, together with the oral testimony of Mr. Levine indicate that CDM has acquired very few customers of RDM. Mr. Levine himself estimated that in terms of dollar volume, only five per cent of his business was formerly serviced by RDM. Although the respondents lost some business when it moved away from the Toronto market, it was able to attract some new customers as a result of its Guelph location. The new customers it has acquired since the commencement of the Guelph operations in January, 1988 however have generally been the result of either Mr. Levine's own initiative and sale techniques, or as a result of the efforts of the respondents' London based salesman. There was no evidence that CDM acquired as new customers any RDM customers by reason of it having acquired the plant and assets of RDM.

30. Within this factual framework we now turn to the submissions of the parties and an examination of the relevant Board's jurisprudence under the Successor Rights Provisions of the *Labour Relations Act*.

31. It was the submissions of the respondents that there had not been a "sale" of "business" within the meaning of section 63 of the Act. Instead, what had transpired was an acquisition of assets by Mr. Levine who already operated a well established, very successful business. The acquisition of assets merely permitted Mr. Levine to extend his own business. This purchase of the assets of RDM did not equate to a purchase of the "business" of RDM. Counsel cited the seven month hiatus period, the lack of overlap of customers, the lack of common management or skills of the employees, the fact that there was no transfer of goodwill, customer lists or accounts receivable, and the difference in the nature of the business which had been carried on by RDM from the nature of the business carried on by CDM in terms of the type of customer, volume, managerial skills, and scale of operations, as indicative of the fact that there had not been a sale of the "business". In support of this submission, counsel referred the Board to *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. Mar. 425, *Super-Tops Holdings Inc.*, [1986] OLRB Rep. Jan. 168 and *USL Industries Inc.*, [1982] OLRB Rep. July 1080.

32. The applicant on the other hand submitted that there had been a sale of a business within the meaning of section 63 of the Act in that the respondents had acquired all, or at the very least part, of the business of RDM. Counsel emphasized that CDM had acquired substantially all of the assets used by RDM to carry on its business and certainly enough assets to immediately start a meat packing business. In response to a question from the Board, counsel suggested that all of the assets acquired together comprised "part" of the business within the meaning of section 63(1)(a) of the Act. In the alternative, counsel emphasized that in section 63(1) a "business" includes a part of a business and argued that in this case CDM had acquired a portion of that four or five per cent of RDM's 70 million dollar business which was of the same type as CDM's. He stated that five per cent of 70 million was certainly a substantial business. Counsel pointed to the fact that both RDM and CDM were in the meat packing business. The skills of the employees were substantially similar. There had been a continuation of employment of some employees including two managerial employees namely John Ferraro as Plant Manager, and the Plant Engineer. In support of this submission he referred to the *Culverhouse Foods Limited*, case *supra*, *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, and *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581.

33. Counsel also underscored the importance to the respondents of the fact that the plant was federally inspected. He analogized the need for a federally inspected plant to the need for a licence to operate a business and argued that, as a federal licence was such an integral part of the meat packing business, transfer of the licence facility pointed to a sale of the business. In support

he cited *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, and *Riverview Manor*, [1983] OLRB Rep. Sept. 1564.

34. Counsel asked us to draw an inference from the fact that CDM acquired a plant seven or eight times bigger than it needed, had not downsized the operations, and had not disposed of any of the assets acquired. The inference which counsel asked the Board to draw was that Mr. Levine was not a credible witness and that in fact, there existed a plan by which Mr. Levine expected and attempted to acquire the profitable RDM business. The success of that plan and the acquisition of that business would be helped by the presence of Mr. John Ferraro at CDM. John Ferraro ensured continuity and could provide the contacts. In this regard counsel asked the Board not to conclude that there had *not* been a sale of a business merely because the plan to acquire that business had failed. Although the respondents business both in terms of dollar volume and livestock processed had declined since the commencement of operations in Guelph, this did not take away from the fact that the initial plan and expectation was to acquire RDM's business. Failure of the business after the purchase does not affect the fact that the "business" was indeed acquired at the time of the sale.

35. Before addressing generally the submissions and the evidence, we wish to deal specifically with the applicant's submission as outlined in paragraph 34. We agree that the subsequent failure of a business after it has been acquired need not negate a finding that there has been a sale of a business within the meaning of section 63. In our view however, it is equally true that mere hopes, intentions or aspirations to acquire a business will not necessarily result in a finding under section 63. The Board's determination under section 63 is a factual one. The intentions of the purchaser, whether they be grandiose dreams of success or sinister schemes to defeat bargaining rights *may* in appropriate cases be a factor to be considered by the Board hearing a section 63 application. Certainly, the latter is a factor relevant to the Board's determination under other provisions of the Act. Generally however, we are of the view that the intention of the parties at the time of the transaction can have little impact upon the factual determinations which the Board must make in section 63 applications. For example, the purchase of a single piece of equipment or machinery from a vendor who is bound to recognize a trade union, with the expectation by the purchaser that the purchase will result in a profitable million dollar business, absent any special circumstances will not usually result in a successor employer declaration by the Board. To put it bluntly, just because the purchaser hopes to acquire all or part of the vendor's business does not necessarily mean that the purchaser has *in fact*, been "sold" the "business" within the meaning of those terms as found in section 63. Similarly, a purchaser to whom all or part of the vendor's business has in fact been "sold" cannot hide behind his subsequent lack of success in maintaining the business and thereby disentitle the trade union from continuing to assert the bargaining rights which have attached to that business. Lack of success or failure to meet business expectations are not defences to finding that a "business" has in fact been "sold". What is required is an examination of the entire transaction and all surrounding circumstances, including the business context, in order to determine whether the two criteria outlined in section 63 have been met; namely, has there been a "sale" within the statutory definition of that term, and is the substance of that "sale" also a sale of "business".

36. In the circumstances of this case we are not prepared to draw an adverse inference merely from the fact that Mr. Levine purchased a plant and property 7 or 8 times bigger than his current requirements. In our opinion, Mr. Levine provided an honest, credible and shrewd business reason for acquiring such a large plant and piece of property when he explained that one of the reasons he wanted these assets was because of the innate value of the property, especially that portion zoned MI which can be severed from the rest of the property. In light of this explanation

we cannot attribute either grandiose dreams of success nor sinister schemes to defeat bargaining rights to Mr. Levine's motives in purchasing these assets as he did.

37. On the facts of this case there can be no doubt that there has been "sale". In keeping with the remedial thrust of the successor employer provisions, both the term "sale" and "business" had been given broad and liberal meanings by the Board. (See for example, *Thorco Manufacturing Limited*, 65 CLLC 780 ¶16,052, *Culverhouse Foods Limited*, *supra*, *Thunder Bay Ambulance Services Inc.*, *supra*, *Metropolitan Parking Inc.*, *supra*). In the circumstances of this case the intervention in the process by the trustee does not prevent a finding that a "sale" has occurred. (See for example, *Culverhouse Foods Inc.*, *supra*, *Marvel Jewellery Limited*, [1975] OLRB Rep. Sept. 733, *Price Waterhouse*, [1979] OLRB Rep. Jan. 50, *Price Waterhouse*, [1983] OLRB Rep. July 1184).

38. As is usual in this type of case, although we have no difficulty in finding that the predecessor RDM has disposed of "something" to the respondents, it is more difficult to determine if the sale of that "something" constitutes a sale of a "business". Once again we note that in the past the Board has given a broad and liberal interpretation to the term "business". As the Board noted in the *Metropolitan Parking Inc.*, case:

A business is a combination of physical assets and human initiative. In a sense it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

In that particular case the Board focused on whether the purchaser had acquired a "functional economic vehicle."

39. Similarly, a "part of the business" must be a functional vehicle. The sale of "part" of a business must be more than simply sale of a part *used* in the operation of the business and must be a transfer of part of the operation itself. A "coherent and severable part" or a "discrete, cohesive portion" of the predecessor's economic organization sufficient to enable the successor to perform a discrete, definable part of the functions formerly performed by the predecessor employer must be transferred. To hold otherwise would mean that each disposition of isolated elements of the business would result in a finding under section 63 of the Act.

Most of the cases under section 55 [now section 63] involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words "part of a business". Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as "part" of its business. But it could not have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 the vehicle for extending rather than preserving bargaining rights.

(See *Vaunclair Meats Limited*, *supra*, at paragraph 25).

40. After reviewing a number of decisions the Board went on the state:

In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization, managerial or employee skills, plant, equipment, "know how" or goodwill, - thereby allowing the successor to perform a definable part of the economic functions formally performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no mate-

rial change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement.

In our opinion the plant and equipment are merely isolated assets and do not constitute the “business” of wholesale meat packing. In the circumstances of this case we find that the acquisition of all of the plant equipment and the continuation of employment of both the plant manager and plant engineer do not constitute a “coherent and severable part” of the predecessor’s economic organization so as to fall within the meaning of the term “part” of a “business” found in section 63.

41. In arriving at our decision in this application we were drawn to the method or approach to section 63 applications enunciated by the Board in *Grand Valley Ready-Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663. There the Board said:

The answer is to be found in an examination of the two business organizations which existed prior to the transaction. In most section [63] applications, whether involving the alleged sale of a whole business or a part thereof, the nature of the alleged predecessor’s business organization provides the ultimate answer. The Board identifies its essential elements and determines if sufficient of these have been transferred to the successor as to allow the business and the employment which it generates to continue. ... However, if ... assets have been disposed of which are peripheral or unrelated to the business organization to which the bargaining rights at issue attach, the Board will not find that there has been a sale of a business within the meaning of the section.

42. The Ontario Labour Relations Board reports contain a multitude of cases involving section 63 applications. It is however impossible to extract from these cases a single factor or element which is always determinative. The difficulties surrounding the factual determinations which the Board must make are compounded by the fact that the elements or factors which are significant in each case can vary with the business context. As a result, there are very few “text book” cases. As was noted by the Board in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while arising out of materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a ‘sale of business’ finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, ‘know-how’, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section [63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

43. Notwithstanding this statement, the *Culverhouse* decision referred to by both parties does set out a non-exhaustive list of factors normally considered by the Board:

... [The] cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to

assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it was [sic] before, i.e., whether there has been a continuation of the business.

44. These various factors can be grouped into two main categories namely, (1) the transfer of key assets including the transfer of goodwill and (2) the nature of the work performed. In addition many of the cases focus on the pre-existing relationship between the parties. In this case there was no evidence before us about a pre-existing relationship between CDM and/or its principles and RDM and/or its principles.

45. Most successorship applications involve the transfer of at least some assets. In and of itself such a transfer is insufficient to warrant a finding of successorship unless the particular assets involved are so integral to the business that their very transfer is a sale of that business. In some types of business the essence of the business consists of equipment so that the transfer of the equipment is an important and significant factor in the section 63 determination. In other instances such as regulated industries a licence is necessary in order to operate the business. In those instances possession of the licence is in effect possession of the essence of the business. The transfer of the licence then becomes a significant factor in the application pursuant to section 63. One of the applicant's submissions in this case focused on the fact that the respondents needed, and in fact obtained, a federally inspected meat packing plant. The applicant argued that in this way the facts of this case could be analogized to the "transfer of a licence" cases. (See for example *Thunder Bay Ambulance Services* and *Riverview Manor*, *supra*.) In our opinion however this case is distinguishable from those cases. Mr. Levine does not require a licence to operate a meat packing business. There is a distinct difference between acquiring the required licence to operate, and acquiring the benefit of owning a federally inspected plant. The respondents did not require a licence to operate but had always operated from a federally inspected plant. In the past Mr. Levine had merely leased federally inspected premises from other landlords. Upon acquiring the Speedvale Avenue location Mr. Levine became his own landlord. Moreover, although it is desirable for Mr. Levine to operate from a federally inspected plant as it provides him with more options, it is by no means necessary for him to operate from a federally inspected plant given his customer base. In our opinion therefore, the fact that the plant acquired was federally inspected is not determinative of the matter.

46. Although the transfer of equipment and other assets is certainly a factor to be considered, this Board has consistently distinguished a "business" from its "assets". A rather unique set of circumstances in which the Board's approach to the distinction between the business and its assets can be found in *Calmil Enterprises*, [1980] OLRB Rep. Apr. 401. Without regurgitating all of the facts of the case we note that the Board found that, through a series of transactions the alleged successor obtained "virtually the entire configuration of assets formerly used by the predecessor in its business organization. Moreover, there is no real change in the character of the business. Normally this would create a strong inference of a sale of a business". Although the union there argued that a sale of a business must always be found in such circumstances, the Board specifically rejected this argument stating:

This argument, in essence, roots bargaining rights in “the assets” rather than “the business”; and we are unable to accept it as a general proposition. A transfer of a significant portion of the predecessor’s assets may well be a “sale of a business”; but it will not always be so.

In the unique circumstances before us we are also of the opinion that the transfer of assets in this case, despite the fact that those assets comprise “virtually the entire configuration of assets” used by RDM, does not in and of itself constitute a sale of a business under section 63.

47. In our opinion an integral part of the meat packing business, a key asset of that business is the “goodwill” found in the business. There are many cases in which the Board has found the transfer of the goodwill of a business to be indicative of the sale of the business. Goodwill may be transferred either directly or indirectly. For example, and in particular, in the retail grocery trade the goodwill of the business can be found in the location of the business so that acquisition of that location necessarily means acquisition of the goodwill (see for example *Dutch Boy Foods*, (1965) 65 CLLC 77 ¶16,051, *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486). In the grocery business cases, for purposes of a determination pursuant to section 63 of the Act, “goodwill” has normally been broadly defined as “the attractive force which brings in customers.” From the evidence before us it would appear that a similarly broad definition of goodwill can be applied to the meat packing business. Goodwill need not be explicitly assigned in the offer to purchase in order for this Board to find that goodwill has been transferred. Indeed, in the *Dutch Boy Foods* case the Board found a transfer of goodwill notwithstanding the fact that “goodwill” was expressly excluded from the purchase price. In our opinion in this case the fact that the Agreement of Purchase and Sale is silent on the matter of goodwill is therefore not determinative of the issue.

48. In the grocery trade, location can, and usually does, carry with it the goodwill of the business. Other indicia of a transfer of goodwill which affect the determination as to whether a sale of a business has occurred include the assignment of trade names or company logos to the successor, or the use of the same company colours, or telephone numbers by the successor; the sale of customer lists or the solicitation of the predecessor’s customers; covenants not to compete given by the predecessor; the acquisition of existing contracts, orders or accounts receivable etc. None of those indicia are present in this case.

49. In some circumstances the goodwill may be personal to specific individuals concerned with the predecessor’s business. Their association with the successor therefore will carry the goodwill of the predecessor to the successor. (See for example *Antionacci Clothes*, [1984] OLRB Rep. July 887, *Stucor Construction Limited*, [1987] OLRB Rep. Apr. 614.) In the circumstances before us we find that there was no transfer of goodwill from RDM to CDM. The two factors which militate against the finding that there has been a transfer of goodwill is the existence of a six-month hiatus period during which RDM’s customers presumably found other meat suppliers, together with the circumstances surrounding the demise of RDM. We accept Mr. Levine’s evidence that by the time he commenced operations there was “bad will” associated with the plant location, the name Royal Dressed Meats and the name Ferraro as a result of the criminal charges of fraud brought against the principals of RDM, and the allegations and investigations into RDM’s sale of tainted meat. We are also of the view that Mr. John Ferraro’s limited association with Mr. Levine after Mr. Levine acquired the premises as outlined in paragraphs 22 to 27 herein, is of little significance. There is no evidence that the fact of Mr. Levine’s somewhat unique business relationship with John Ferraro assisted the respondents in any significant way to carry on the operations. The relationship which developed between the two men after the offer of Purchase and Sale had been entered into was completely separate from the transaction whereby CDM acquired RDM’s assets. The deal itself was not contingent upon the development of such a relationship and Mr. Ferraro had no involvement with, or impact upon the acquisition of the assets by Mr. Levine from the trustee.

50. The second main category of cases involving section 63 applications focus upon the nature of the work performed by employees of the predecessor and alleged successor. From a labour relations perspective, the importance of a “business” is the jobs that it provides for the employees. If there is a continuity in the work performed, regardless of whether there is an actual continuity of employees, there is a strong inference that there has been a transfer of business (see the *Tatham Company Limited*, *supra*). This line of cases was emphasized by counsel for the union. We were referred to the *Metropolitan Parking* case where the Board stated:

Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since a trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55.... Unless there is a continuity of work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

We note however that in that case, at a subsequent paragraph, the Board stressed that a transfer of work in itself does not equal a sale of a business. At paragraph 36 of the decision the Board states:

Despite the labour relations focus of the statute “the business” is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals*. Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to void the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it...

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [Emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business

itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

The focus of section 55 is the business entity - the employer's total economic organization - not simply the work which the employees perform.

51. We therefore return to focus upon the employer's "total economic organization". In this case, our focus upon the total economic organization is further complicated by the fact that Mr. Levine already had an established business. We recognize that an expansion or alteration of one's own business need not necessarily result in a successor employer declaration. The difficulty lies in drawing the line where the purchaser purchases the assets of another employer bound by a collective agreement in order to further his own expansion. Once again, the Board has attempted to draw this line by examining the alleged successor's "total economic organization" and comparing that entity and the nature of its work to the original work of both the vendor/predecessor and the purchaser/alleged successor.

52. After reviewing a number of cases in the area, the Board in *Grand Valley* stated:

These cases illustrate the attention which must be paid to the nature and scope of the alleged successor's business where the successor carries on a parallel or like business prior to the section [63] transaction. The bargaining rights which are to be preserved under section [63] attached to the predecessor's business and it is the predecessor's business, or a part thereof, which must be transferred. If the transaction is one carried out in connection with the operation of a parallel business and if the business entity which results can more properly be described as having its roots in the alleged successor's business than in the alleged predecessor's business, it is unlikely that a sale of a business within the meaning of section [63] has taken place.

53. More recently, in cases involving the retail grocery trade the Board has enunciated a similar principle. (See for example *Super Tops Holdings Inc.*, [1986] OLRB Rep. Jan. 168, and *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. Mar. 425). The thrust of these decisions is that where an employer, who already has a successful business, acquires another facility for the purpose of extending his own enterprise, he is not acquiring someone else's business but is merely acquiring a facility to run his own already established business.

54. In *Keele-Wilson* the matter was put at follows:

20. We do not doubt the importance of location in the retail food industry - particularly since the habit of shopping locally can be an important element of good will and can be the key to business success even if good will is not expressly recognized in the transaction by which the location is acquired. There is no doubt that in this case, there are indications which, when considered in the context of the retail food industry, do tend to point towards a sale of a business within the meaning of section 63. The company continues to carry on a food business from the same location as Safeway which has effectively withdrawn from that local market. The hiatus period between the closing of Safeway and the opening of Super Tops is relatively small (six weeks). The premises and general store layout are similar.

21. But there are also a number of factors which point in the other direction. Mr. Chetti had no intention of acquiring Safeway's business. Indeed, quite the contrary. He already operated two ethnically-oriented supermarkets in Metropolitan Toronto and was anxious to open a third. Safeway's business, as such, was unprofitable and not worth buying.

22. Mr. Chetti learned of the possibility of acquiring the Safeway premises from an independent real estate agent. The company did not acquire any managerial or other expertise from Safeway.

The entrepreneurial initiative, managerial talent, and employee skills were all derived from Mr. Chetti's pre-existing operations or were assembled following the sale. A substantial sum was expended so that the new store would conform to Mr. Chetti's business concept rather than that of Safeway. Mr. Chetti knew that his success depended upon expanding, serving and developing his own market which was not being served by Safeway or the other local chain stores. He was able to do this with dramatic success because he was able to bring to bear his own business organization to attract customers whom Safeway never reached. That is why he was able to instantly triple the sales volume. He was not acquiring the reviving an ailing "part" of Safeway's business. He was expanding his own business from premises formerly occupied by Safeway.

23. We accept the union's submission that in the retail food business location is important, and the acquisition of physical premises will in many cases be sufficient to trigger a finding of "successorship", moreover, when a "severed part" of a business has been transferred it would be an unusual purchaser who did not undertake any new initiatives, or try to put his own imprint upon his recent acquisition. On balance, however, we do not find a sale of a business in the facts of this case. In our view, the presence of Super Tops at Safeway's former location represents the expansion of an already well-established business in which some assets of Safeway came to be used. Those assets did not alone constitute a business or part of a business, and it cannot be said in this case that the company has expanded by purchasing a competitor's business and refurbishing it. It has merely purchased some ideal and uneconomic assets which it has used to expand its own successful going concern. Section 63 has no application ...

55. In the circumstances of this case we also find that section 63 has no application. When we examine the business of Mr. Levine both while he operated from the Toronto location and after he commenced operations in Guelph, and compare that to the business carried on by RDM we find that the "roots" of Mr. Levine's Guelph operations lie in the business he operated in Toronto rather than in RDM's business.

56. Upon the commencement of operations in Guelph, Mr. Levine acquired few new customers. The vast majority of his customers were the same customers which he had previously serviced from the Toronto location. In addition, the new customers which were acquired were acquired from the London and Windsor area through the efforts of Mr. Levine and his London based salesman. New customers were not acquired as a result of Mr. Levine having acquired the RDM facility, nor were they acquired because Mr. Levine could somehow trade upon either the RDM name or an illusory association with any of the principals of RDM. The new customers were gained because of Mr. Levine's own entrepreneurial skills and sales techniques. The essence of Mr. Levine's business and its most important asset while operating from Toronto was Mr. Levine himself. It was his skills and talents, especially his personal relationship with customers, which have made the business a profitable operation. That essence of the business, that key element, was transferred to the Guelph facility where Mr. Levine continues to be the prime indeed sole driving force behind the operations.

57. On the basis of the evidence we find that the operations of the respondents need not be carried out from a particular plant or from a particular geographic area. Although it is true that the person engaged in the wholesale meat packing business needs a certain type of facility and a specific type of equipment, neither the plant itself nor the equipment form the "key" elements of the "business" of wholesale meat packing. Rather, the key element is the entrepreneurial skills, managerial ability and specialized sales techniques which permit and foster the development of one-to-one personal relationships between customer and supplier. This key element forms the "dynamic intangible" which separates the assets of plant and equipment from the "business" of wholesale meat packing. The only real difference between the Toronto and Guelph operations is that in Toronto, for the most part, Mr. Levine leased the required facility and equipment - in Guelph he owns it. In neither location however could it be said that the facility and equipment comprise the "business" of the respondents. Rather the "business" of the respondents exists because of Mr.

Levine and the customer base which he has established. The attractive force which brings customers to CDM is not the plant or its location but Mr. Levine himself.

58. When we look at these two elements, namely the number and type of customer and the skills and ability of Mr. Levine, we find not only that these two factors have remained relatively constant upon the transfer of operations from Toronto to Guelph, but we also find that these elements are either missing from, or are distinctly different from the operations that had been carried out by RDM in Guelph. First, Mr. Levine had no association or relationship with the predecessor employer or its principals. Secondly, there is only minimal, indeed minute, overlap in the customers of CDM who had previously been customers of RDM. This is because the basic meat packing business of the two entities were vastly different. While CDM developed its customer base from the small retailer and small independent butcher, RDM's customer base consisted primarily of the large major chain retail grocers. CDM's business was built upon what may be colloquially described as the "personal touch" - one to one relationships, specialized cuts etc. RDM on the other hand was one of the country's largest wholesalers of dressed meats. The essence of its business was large scale and high volume to the major chains. As a result, after nearly five months of business only five per cent of CDM's current "business" had previously been members of RDM. That figure is not surprising given the fact that the parties agreed that only approximately four or five per cent of RDM's 70 million dollar business came from the same type of customer as the business serviced by CDM. When RDM vacated the market in July of 1987, someone had to fill the void. CDM managed through its own independent solicitation of customers to fill a minute portion of that void. To say however that this acquisition of a few new customers constitutes a sale of all or part of a business within the meaning of section 63 would stretch both the purpose and plain meaning of that section.

59. For all of these reasons we find that there has not been a "sale" of a "business" or "part" of a "business" within the meaning of section 63. The application is dismissed. Having regard to the submissions of the parties referred to in paragraph 1, we also dismiss the section 89 complaint.

2460-87-U; 2804-87-U; 2805-87-U; 2806-87-U; 3235-87-U; 3523-87-U; 3524-87-U; 3525-87-U; 0136-88-U; 0251-88-U; 0678-88-U; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Complainant v. Cuddy Food Products Ltd., Respondent v. United Food and Commercial Workers International Union, Local 175, Intervener

Arbitration - Interference in Trade Unions - Unfair Labour Practice - UFCW entering into collective agreement with employer covering new plant - RWDSU applying to be certified as bargaining agent for employees at new plant - Collective agreement found to constitute bar to RWDSU - RWDSU bringing complaints against employer for alleged pattern of harassment - Board declining to defer to arbitration

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *M. Rozenberg* and *E. G. Theobald*.

APPEARANCES: *David Jewitt, Bob Low, Frank Reilly and Jane Hoekstra* for the complainant;

John B. West, George F. Root, and Jack Westman for the respondent; *Douglas J. Wray and John Hurley* for the intervener.

DECISION OF THE BOARD; August 29, 1988

1. We have before us eleven complaints filed pursuant to section 89 of the *Labour Relations Act* ("the Act"). In each of the complaints the complainant is the Retail, Wholesale and Department Store Union, AFL:CIO:CLC ("RWDSU") and the respondent is Cuddy Food Products Ltd. ("Cuddy Food"). Although a formal intervention was not filed with the Board in all of the files, the United Food and Commercial Workers International Union and its Local 175 ("UFCW") appeared before the Board and sought to intervene in each of these eleven complaints. A recitation of the facts quickly discloses that the UFCW has an interest in these proceedings, may be affected by these proceedings and we find has status to intervene in these proceedings by virtue of its existing bargaining rights.

2. In the complaint filed in Board File No. 0678-88-U, the complainant requested that the Board consolidate that complaint with complaints previously filed in Board Files 2460-87-U, 2804-87-U, 2805-87-U, 2806-87-U, 3235-87-U, 3523-87-U, 3524-87-U, 3525-87-U, and 0136-88-U. Although not referred to in this list, in the complaint filed in Board File 0251-88-U, the complainant requested that the Board "appoint an officer to deal with this and the other complaints outstanding." As a result, all eleven files were scheduled for hearing and came before this Board on June 30, 1988. At that time no objection was taken to the listing of these matters together. In light of the intervening preliminary objection however, the Board did not hear any arguments dealing with, and has not dealt with or ruled upon the complainant's request for consolidation.

3. Before addressing the preliminary objection we hereby grant to the complainant leave of the Board to withdraw the complaint filed in Board File No. 2804-87-U. Similarly, at the subsequent request of the complainant contained in the letter dated July 18, 1988, we hereby grant to the complainant leave of the Board to withdraw the allegations contained in Board File No. 2806-87-U relating to the grievor Rick Vandale.

4. For the purpose of dealing with the respondent's preliminary objection the parties were in substantial agreement on the facts although each party sought to put its own "gloss" on those facts. The following are the basic facts upon which the parties agreed.

5. The UFCW Local 175 had a collective agreement with Cuddy Food which, on its face, applied to persons employed in the bargaining unit in the City of London, Ontario. At the time that collective agreement was negotiated, Cuddy Food operated two plants in the City of London. The collective agreement expired February 7, 1987 and the UFCW and Cuddy Food commenced negotiations for a new collective agreement. Whilst those negotiations were in progress, Cuddy Food commenced to operate a third plant, at 10 Cuddy Blvd. also in the City of London. Thereafter the UFCW entered into two separate agreements with Cuddy Food. One collective agreement covered the two plants which had been in existence, while the other collective agreement covered only the employees at the new location at 10 Cuddy Blvd. The latter collective agreement, which was signed July 30, 1987, has a duration clause which states that it is effective from June 1, 1987 until May 30, 1989. The 10 Cuddy Blvd., London, Ontario plant commenced operations in late March, early April 1987. The RWDSU applied to be certified as bargaining agent of the employees at 10 Cuddy Blvd. on August 20, 1987 (Board File 1363-87-R). The UFCW intervened in that application and responded that it represented the employees at 10 Cuddy Blvd. and that the existing collective agreement constituted a bar to the RWDSU's application for certification.

6. In October 1987, the Board also received a complaint filed pursuant to section 89 of the Act in which a number of employees at 10 Cuddy Blvd. alleged that the UFCW was in breach of its section 68 duty of fair representation (Board File No. 1928-87-U). The relief requested in that complaint included a request that the collective agreement between Cuddy Food and the UFCW be set aside, or otherwise that an open period be found in order to permit the RWDSU's application for certification to be dealt with by the Board.

7. Both those matters proceeded to hearing before a differently constituted panel of the Board. On November 27, 1987, during the course of those hearings, the Board rendered an oral ruling which has not yet been reduced to writing. The parties agreed, however, that the essence of the oral ruling was that the collective agreement which existed between the UFCW and Cuddy Food "did constitute a bar to the RWDSU's certification application subject to the outcome of the section 68 complaint." The certification application, however, was not dismissed because, according to the complainant in these matters, the only issue determined by that panel of the Board was that the existing collective agreement was not a "voluntary" recognition agreement pursuant to section 60 of the *Labour Relations Act* and therefore did constitute a bar, subject to the final disposition of the section 68 complaint. It cannot be said that before us all of the parties concurred with this latter assertion. The hearings into the RWDSU's certification application and the section 68 complaint were completed on May 30, 1988. A decision on those matters has not yet been rendered. During the relevant period of time, the UFCW and Cuddy Food have continued to apply the terms and conditions of the collective agreement, i.e., dues have been deducted and remitted to the UFCW, grievances have been filed, some of which have been referred to arbitration. We note also that each of the complaints before this Board was filed after the Board had rendered its oral decision that the collective agreement constituted a bar to the RWDSU's application for certification.

8. Those are the basic facts upon which the parties agreed. To those facts we find it necessary to provide some details about the nature of these eleven complaints prior to addressing the submissions of counsel. Each complaint is made by the RWDSU on behalf of itself and certain named grievors who allege that they have been improperly laid off, have improperly received a verbal or written reprimand, have been denied bereavement pay, have had seniority improperly calculated, or have been demoted or discharged. In each complaint the complainant alleges a violation of section 79, the statutory freeze. The thrust of this allegation consists of an assertion that action taken was contrary to the provisions of the collective agreement, the terms of which are statutorily frozen by the RWDSU's application for certification. Each complaint however also contains an allegation that Cuddy Food took the action complained of because of the grievors' support for the complainant union. Only some of the complaints specifically plead that the action complained of was motivated by anti-union animus. Many of the complaints plead that specific action was taken because the affected grievors were "open and vociferous supporters of the complainant." Other complaints refer to the fact that the penalty imposed was due "in part" to the grievor's support for the complainant, or "partly because of his union sympathies and involvement", while some plead that action was taken "solely because" of the grievor's support for the complainant. In each complaint therefore there is an added allegation that the actions taken were in violation of section 64 of the Act. Four of the remaining ten complaints also refer to section 66 and section 70 of the Act and allege those sections to have been violated by the respondent's conduct.

9. Within this factual framework we now turn to briefly outline the submissions of counsel. Counsel for the respondent employer based his preliminary objection on three primary grounds, all of which are somewhat intertwined and interrelated. Counsel submitted that pursuant to section 89 the Board has discretion to refuse to inquire into a complaint. Counsel asked this Board to refuse to inquire into these complaints because (a) the complainant has no standing to bring these

allegations, (b) the individual grievors named in each of the complaints have an equivalent, alternative remedy available under the collective agreement and (c) the complaints by the very nature are an abuse of process. In respect of the first of these two grounds, counsel submitted that as of November 27, 1987, by virtue of the Board's ruling, the RWDSU had no legal "interest" in representing the employees. As of that date the Board had determined the status of the UFCW's right to represent employees at Cuddy Food and the status of the collective agreement between the UFCW and Cuddy Food (although that agreement was subject to the ultimate disposition of the section 68 complaint). The Board had determined the UFCW's right to represent the employees at 10 Cuddy Blvd., and had determined the existence of the collective agreement (albeit subject to the section 68 complaint) which acted as a bar to the RWDSU's assertion of a right to represent these employees. Counsel submitted that as of that date, therefore, the RWDSU became a legal stranger to the employment relationship which Cuddy Food has with its employees. That relationship is presently governed by the existing collective agreement. The RWDSU's right to represent these employees is no greater than the rights of the individual aggrieved persons under the existing collective agreement. Counsel alleged that the substance of what the RWDSU was attempting to do under the guise of these section 89 complaints, was to continue to attempt to represent the employees notwithstanding the Board's ruling that it did not have such a right to represent employees because of the existence of the UFCW collective agreement which acted not only as a bar to the RWDSU's application for certification, but also acts as a bar to RWDSU's right of representation. Counsel emphasized that the essence of each of the complaints was contractual in nature. He argued that the RWDSU was trying to usurp the role that the UFCW has under the collective agreement - a collective agreement which to date has not been ruled invalid. Counsel argued that as the complaints are substantially contractual in nature, and as the RWDSU can have no greater right than the individual grievors to enforce those contractual rights, the most appropriate forum to determine these matters was the grievance and arbitration process of the collective agreement.

10. In respect of his argument that the complaints were an abuse of process, counsel argued that some of the complaints were clearly spurious consisting as they do of complaints arising out of verbal warnings given to employees for working slowly, for smoking in the washroom, for refusing to work overtime, for going from one area of the plant to another without permission, and written warnings to an employee who had been absent without leave for two days, or written warnings to other employees for alleged contamination of food product being processed. He asserted that the remaining complaints alleged violations of the call-in, layoff or seniority provisions of the collective agreement but that none of these complaints were the "usual" section 89 complaints "normally" brought before the Board as a result of a union's organizing drive. He emphasized that the "vulnerable period" for the employees had passed by the time the first complaint was filed in December 1987. The thrust of his argument appears to be that, given the nature of the complaints, and given that the timing of the complaints post-dated the Board's ruling in respect of the RWDSU's application for certification, one could only assume that the complaints were filed for political reasons in order to assist the complainant in maintaining a presence at the plant. He essentially argued that the Board ought not to countenance the RWDSU's attempt to seek legitimacy through the use of the section 89 complaint process in this manner.

11. Finally, counsel submitted that the statutory freeze is a neutral factor meant to preserve the status quo and thereby protect each of the parties to these proceedings - the UFCW as well as the RWDSU and the respondent employer. In support of all of these submissions counsel relied upon the Board's decision in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254.

12. Counsel for the intervener UFCW sought to characterize the intervener's position as being, colloquially speaking, between a rock and a hard spot. He asserted the UFCW's right to represent these employees, asserted its collective agreement with Cuddy Food, and asserted the

UFCW's obligation to properly represent the employees in accordance with that collective agreement and the provisions of the *Labour Relations Act*. At the same time, counsel acknowledged the Board's authority to inquire into matters where allegations of anti-union animus and resultant violations of the *Labour Relations Act* were involved. For his part, he proposed that in those cases where anti-union animus was alleged, the Board ought to proceed with its inquiry insofar as a violation of the *Labour Relations Act* was alleged. He submitted, however, that if the incident giving rise to the complaint was contractual in nature, the affected employees ought to grieve and the Board ought not to inquire into those matters. He stated that in those instances the RWDSU was interfering with the UFCW's right to represent the employees. Counsel indicated that the UFCW was willing to assist these individual complainants in the preparation of their grievance and to assist them throughout the grievance procedure. Counsel stopped short, however, of guaranteeing that all complaints would be brought to arbitration. Finally, counsel for the UFCW raised the concern that in some instances the individual complainants had also filed concurrent grievances which were in process or which were to proceed to arbitration. He cited the obvious policy reasons against concurrent procedures. Other than the complaint of Mr. Vandale however, the parties did not provide to the Board any clear indication as to which of these complaints was also the subject of a concurrent grievance.

13. In response to these submissions, counsel for the complainant asserted that it had the right to prosecute actions taken against its members by reason of their union membership. Counsel pointed to what he termed as a "common thread", namely that persons known to be RWDSU supporters were being discriminated against. Counsel alleged a pattern of harassment against RWDSU supporters and argued that the RWDSU had an interest, and the requisite status to ensure that their members were not being discriminated against because of their membership in, or support of, the RWDSU. Counsel also submitted that a deferral to arbitration would not provide an adequate remedy as, for example, a board of arbitration was unlikely to direct the employer to stop harassing RWDSU supporters. Similarly, the board of arbitration could not resolve the dispute between the two unions. It is trite to say that the RWDSU is not a party to the collective agreement and would not be a party to the grievance and arbitration process under that collective agreement.

14. The leading cases in which the issue of when and under what circumstances the Board ought to defer to an alternative process continue to be *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 and *Imperial Tobacco Products (Ontario Limited)*, [1974] OLRB Rep. July 418. In *Valdi* the Board stated:

4. The issue of whether or not the Board should defer to grievance arbitration arises when an alternative remedy exists under a collective agreement which is available to the grievor or complainant. Although the complainant has chosen to seek its remedy before the Ontario Labour Relations Board, the Board has a discretion under section 79 to refuse to inquire into a complaint and the existence of an equivalent remedy under a collective agreement has, in the past, been a basis on which the Board's discretion has been exercised. In other words, the Board is not obligated to inquire into every complaint brought under section 79 and its refusal to so inquire cannot, therefore, be characterized as an improper refusal to exercise its jurisdiction. See *Regina v. Ontario Labour Relations Board ex parte T.R.W. Electric Components Ltd.* (1969), 9 D.L.R. (3d) 669. On the other hand, it is the Ontario Labour Relations Board that is charged with the responsibility for administering *The Labour Relations Act* and the important rights it confers on employers and employees. This responsibility is a public duty and a policy of deferral to a more private process where the adjudicators are paid and selected by the parties to a collective bargaining agreement must find its justification within the four corners of *The Labour Relations Act* to be consistent with that public interest. To many, this justification is not readily apparent. See Bilkin, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases?* (1973), 24 Lab. L.J. 818; Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases* (1976), 27 Lab. L. J., 201; Newman, *NLRB Deferral to Arbitration in Unfair Labor*

Practices (1973), 26 N.Y.U. Conf. on Lab. 37; and Comment, *Deferral to Labor Arbitration* (1975), 27 Hastings L.J. 403. Why, it can be asked, should the Board ever defer to a private arbitration where a question concerning the application of *The Labour Relations Act* arises? Arbitrators are expert on the language of collective agreements and do not, as a group, have the expertise in labour board statutory issues that the Board has necessarily acquired through a long, intimate and specialised experience with its statute. The involvement of arbitrators in statutory issues may well result in a lack of uniformity over the meaning of important provisions of *The Labour Relations Act* or encourage direct judicial construction of an extrinsic statute on an application for judicial review. See *McLeod v. Egan*, [1975] 1 S.C.R. 517. In contrast, the Ontario Labour Relations Board is an ongoing administrative agency whose jurisdiction is provided for in the context of a privative clause. It, therefore, is able to achieve a uniform interpretation of the statutory provisions it considers. Indeed, the Board's experience in such matters provides the very justification for the statute's privative clause. There is also the possibility that the deferral of tough statutory questions to grievance arbitration will encourage lengthy, costly, complicated and legalistic hearings in that forum. This result would undermine the very features of grievance arbitration that underlie the policy of *The Labour Relations Act* requiring its insertion in every collective bargaining agreement. In fact, today, in contrast to Ontario Labour Relations Board proceedings, there is considerable doubt that grievance arbitration is sufficiently expeditious and inexpensive. Finally, there may be important procedural and remedial differences between the Ontario Labour Relations Board and grievance arbitration in any particular case and, where this may be the case, a deferral to grievance arbitration could deprive a complainant of important statutory rights. For example, if a matter did not involve discipline or discharge, a complainant would not have the benefit in grievance arbitration of the reverse legal onus provided for under section 79 of *The Labour Relations Act* nor would he have access to the Board's expansive remedial powers provided for by this same section. Surely these factors are relevant to any decision by this Board to defer to another forum. And, it is against these considerations that some might ask the more fundamental question of what business does the Ontario Labour Relations Board have in the "subcontracting" of any public authority to private tribunals?

5. The answer to this question depends upon the fact that the statute creating the Labour Relations Board is the same statute that requires grievance arbitration of all disputes over the interpretation, application and administration of a collective agreement. On a review of *The Labour Relations Act*, it is difficult to conclude that grievance arbitration is simply a private process and that it is any less important than the Ontario Labour Relations Board in fostering industrial peace and facilitating co-operation between employees and employers. See Weiler, *Reconcilable Differences, New Directions in Canadian Labour Law*, (1980), chapter 3. Viewed in this light, a policy aimed at integrating their responsibilities and dealing with concurrent jurisdiction problems is not as troublesome as it is in those situations where grievance arbitration shoulders a responsibility under a different or extrinsic statute. For example, in the latter situation the United States Supreme Court has said there should be a trial *de novo* under Title VII of the *Civil Rights Act of 1964* even though the precise issue of racial discrimination has been submitted to final and binding grievance arbitration. See *Alexander v. Gardner-Denver* (1974), 415 U.S. 36. But see also the NLRB's distinction in *Electronic Reproduction Service Corp.* (1974), 87 LRRM 1211 at 1218. Some perspective can be gained on the issue by looking at it from grievance arbitration's viewpoint and asking whether the express statutory policy of encouraging the practice and procedure of collective bargaining would be effectuated if this Board was to police all collective agreements to decide if disputes over the meaning of these documents also constituted a violation of *The Labour Relations Act*? We think not. Moreover, the complete absence of a deferral doctrine means that parties would face the prospect of incurring the expenditure of time, money and their patience in two proceedings - a prospect unlikely to contribute to a healthy collective bargaining relationship. In addition, there is no longer any doubt that labour arbitrators have the jurisdiction and duty to consider public statutes that bear on the questions brought before them (unless the statute specifically provides otherwise) and there is considerable evidence that the arbitrators active in Ontario are not strangers to the provisions of *The Labour Relations Act* and the underlying policies. See *McLeod v. Egan*, *supra*, and, for example, arbitration cases considering whether a collective agreement exists in light of the provisions of *The Labour Relations Act*. *Automatic Screw Machine Co., Automotive Hardware Ltd.* (1970), 21 L.A.C. 255 (Shime); *Loblaws Groceries Co. Ltd.*, (1972), 24 L.A.C. 369 (Shime). But see *Canada Labour Code* R.S.C. 1970 c. L-1 as amended, s. 54. Grievance arbitration is an institution centered on achieving industrial self-employment and has played a vital role in reducing

industrial strife. See Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967), 45 Can. Bar. Rev. 786; Cox, "Reflections on Labor Arbitration" (1959), 72 Harv. L. Rev. 1482; Adams, "Grievance Arbitration and Judicial Review in North America" (1971), 9 Osgoode Hall L.J. 443; Weiler, "The Role of the Labor Arbitrator: Alternate Versions" (1969), 19 U. Tor. L.J. 16. Moreover, recent legislative change has sought to insure that arbitration remains a relatively inexpensive and expeditious process and the courts now evidence a willingness to defer to arbitral decisions save in the most exceptional circumstances. See *The Labour Relations Amendment Act*, 1979 S.O. 1979, c. 32. And see generally: *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.* (1979), 99 D.L.R. (3d) 385 (S.C.C.); *Heustis v. New Brunswick Electric Power Commission* (1979), 98 D.L.R. (3) 622 (S.C.C.); *Association of Radio & Television Employees of Canada CUPE-CLC v. Canadian Broadcasting Ltd.* (1973), 40 D.L.R. (3d) 1 (S.C.C.); *Bell Canada v. Office and Professional Employees International Union, Local 131* (1973), 37 D.L.R. (3d) 561 (S.C.C.). When deferral is looked at in this light, it becomes less self-evident that a policy of giving full play to a process of dispute resolution manned and administered by the parties is inconsistent with the Board's broad statutory mandate aimed at encouraging the practice and procedure of collective bargaining. This is particularly the case if the Board's mandate is viewed not so much in terms of a proprietary interest in its unfair labour practice jurisdiction, but rather in the realization that the purpose of that jurisdiction is to contribute to labour relations stability and harmony. Accordingly, the arguments for and against a policy of deferral to grievance arbitration rely upon significant but conflicting values and this conflict in values, unsurprisingly - has established a "discretionary balance" on deferral questions. The Board will defer but deferral, either before or after arbitration is in no way automatic.

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7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶17,0483; *John Inglis Co. Ltd.*, (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16, 185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC, ¶16,198 and *Collingwood Shipyards*, [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement where they have created. See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont. Ltd., et al.)*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in the forum could have been inadequate. See *Wallace Barnes Company Ltd.*, (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited*, *supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited*, *supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard and Stephenson*, *supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly with the unfair labour practice issues.

15. Although this case, as others, refers to the issue as a “deferral to arbitration”, the more appropriate terminology to be employed is a deferral to the grievance and arbitration “process” of the collective agreement. In this instance for example, although the UFCW indicates a ready willingness to assist the grievors named in the complaints in the filing and processing of their grievance pursuant to the provisions of the collective agreement, the UFCW would not guarantee that it would necessarily take each grievance to arbitration. Instead, the UFCW indicated that the decision as to whether to proceed to arbitration in any particular case would be based on the type of criteria usually employed by the UFCW in making such determination, i.e., presumably such factors as the cost of proceeding to arbitration, likelihood of success, the “seriousness” of the grievance, including the severity of the discipline imposed, impact upon the bargaining unit as a whole, etc. The UFCW’s determination as to whether to proceed or not proceed to arbitration would however be subject to scrutiny pursuant to section 68 of the Act.

16. Returning for a moment to the principal issue of when and under what circumstances the Board ought to defer to the process specified in an existing collective agreement, we note that in an earlier decision of the Board the chairman of the Board in *Valdi* stated:

While the Board wishes to go on record as saying it is not obligated to defer to that process in that a breach of the Act or an alleged breach of the Act is a matter within the jurisdiction of the Board -- the agency charged with the responsibility of administering the legislation -- the Board has chosen to exercise its discretion under section 79 by deferring to grievance arbitration in appropriate circumstances. These circumstances generally involve the allegation of an unfair labour practice that constitutes, at the same time, an alleged breach of a collective agreement. Because the legislation has imposed grievance arbitration upon the parties to a collective agreement where differences arising between them relating “to the interpretation, application or administration” of the agreement, the Board has wisely decided to refrain from intervening under section 42 or under any other more prohibitory sections of the Act....Any other course might undermine the important values of the grievance arbitration process - a possibility the Legislature clearly intended to avoid.

But in deferring to arbitration the Board has always assumed that arbitration would effectively resolve both the unfair labour practice alleged and the violation of the collective agreement.

See *Imperial Tobacco Products (Ontario Limited)*, [1974] OLRB Rep. July 418 at 433-434.

17. In the circumstances of this case, we are of the view that a deferral to the process defined in the collective agreement will not “effectively resolve both the unfair labour practice alleged and the violation of the collective agreement.” Moreover, in the circumstances of this case, such deferral is inconsistent with the public interest and with the Board’s ultimate responsibility to administer the *Labour Relations Act* and the rights which are conferred upon employers, employees and trade unions under that Act.

18. We start our analysis with the proposition that in the absence of allegations of unfair labour practices against the company, a trade union seeking to displace an incumbent union ought not to come before the Board alleging a violation of the statutory freeze based *solely* on an alleged violation of the collective agreement. Where, as is the case before us, a collective agreement is in existence, the “status quo” for purposes of the statutory freeze includes (but is not always limited to) the terms and conditions of the subsisting collective agreement (or the recently expired collective agreement). If the *only* violation of the statutory freeze is an allegation that the employer has failed to comply with a subsisting (or recently expired) collective agreement then that alleged violation of the collective agreement is a proper matter for the grievance and arbitration process specified in the collective agreement. The incumbent’s rights and obligations to enforce its collective agreement remains intact until the displacement application has been finally dealt with, and those rights and obligations cannot be circumscribed by the “raiding” union under the guise of an unfair

labour practice complaint alleging a breach of the statutory freeze. This flows from the operation of section 56(1) of the Act which states:

56.-(1) If the trade union that applies for certification under subsection 5(4), (5) or (6) is certified as bargaining agent for any of the employees in the bargaining unit defined in the collective agreement, the trade union that was or is a party to the agreement, as the case may be, *forthwith* ceases to represent the employees in the bargaining unit determined in the certificate and the agreement ceases to operate in so far as it affects such employees.

19. A certification application which involves the displacement of an incumbent trade union may trigger section 79(2) (see *Manuel DaSilva*, [1984] OLRB Rep. June 834). The displacement application may or may not be successful. The effect of section 56(1) is to formalize the result in those cases where the displacement application is successful. Without section 56(1) there would be two bargaining agents representing the employees, and perhaps two collective agreements in respect of that same bargaining unit. Section 56(1) avoids such a situation by formally terminating the bargaining rights of the incumbent and by rendering the collective agreement of the incumbent inoperative. The use of the word “forthwith” however clearly indicates that such formal termination takes place only upon the certification of the “raiding” union. Until then, the incumbent continues to represent the employees in the bargaining unit subject always to the duty of fair representation pursuant to section 68 of the Act.

20. In the abstract, we are not prepared to assume that an incumbent union will fail in its section 68 duties or will fail to properly promote the interest of aggrieved persons through the grievance and arbitration process. In this case, we are particularly reluctant to cast such an aspersions upon the integrity of the incumbent union (a) in the absence of any pleading or suggestion that the incumbent union has engaged in collusion or connivance with the respondent employer with respect to the actions taken by the employer and (b) in light of the incumbent union’s specific undertaking to assist the aggrieved persons in the filing and processing of their grievances in accordance with the collective agreement and subject to their duties under the *Labour Relations Act*.

21. In paragraph 17 we noted that the “status quo” of the “statutory freeze” is not necessarily limited to the terms and conditions contained in the subsisting (or recently expired) collective agreement although those terms and conditions do undoubtedly form part of the freeze. In our opinion, the statutory freeze goes beyond wages or the strict terms and conditions contained in the collective agreement. Undoubtedly, the starting point for determining the content of the freeze is a collective agreement, but that is not to say that the collective agreement comprises the sole source of the “wages or any other term or condition of employment or any right privilege or duty of the employer, trade union or the employees.” It may be that the employees enjoy a “right” or “privilege” which is not specifically spelled out in the collective agreement. Denial of such a right or privilege therefor cannot always be redressed through the filing of grievances. It would appear that in those instances it would be equally open to both the incumbent and the raiding union to file a complaint alleging a breach of the statutory freeze. In this regard, we agree with the decision of the Board in the case of *Manuel DaSilva Foods Limited*, [1984] OLRB Rep. June 834 where it was stated:

17. ...The purpose of section 79(2) is to preserve the established framework of the employment relationship - including privileges - until an applicant union’s certification application has been disposed of. It maintains the status quo while representation questions are being resolved and is intended, primarily, to protect the position of an applicant union. We see no basis for the submission that some certification applications trigger the freeze while others do not. If the Legislature had intended to exempt displacement applications from the ambit of section 79(2), appropriate language could easily have been included to effect that purpose. No such language is present and from a policy point of view, we see no sound basis for distinguishing between unorganized situations where the status quo must be maintained and “raids” where, it is said, the sit-

uation can fluctuate. If stability is a desirable objective, it is equally desirable in both situations. In our view, once the terms of the section have been met, the freeze is triggered.

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20. We are not persuaded that the Board should defer this question to arbitration. In the first place, what we are dealing with here are statutory rights under section 79(2), not, strictly speaking, contractual rights under the collective agreement. Moreover, those rights are being asserted by the UFCW, which is not a party to that collective agreement, which is not in a position to invoke the grievance procedure or influence a process by which any grievance might proceed to arbitration and which probably has no status to participate in the arbitration proceeding. By the time of the hearing, CURRE had not even filed a grievance on the employee's behalf, nor was it able to identify or articulate any contractual basis for doing so. In our view, it would be inappropriate to defer a claim by the UFCW based upon an alleged statutory violation to a private forum where the UFCW's status is uncertain and which is controlled by the employer and the intervener - both parties adverse in interest to the UFCW in the certification proceeding which triggered the freeze in the first place. Why should the complainant have to depend upon them for its remedy? We also note that section 79(3) contemplates an arbitration option for the resolution of freeze questions arising under section 79(1) and there is no similar procedure contemplated in respect of alleged breaches of section 79(2). The wording of section 79(3), by implication, suggests that section 79(2) questions should be resolved by this Board.

See also *Sunnybrook Foods Limited*, [1985] OLRB Rep. Feb. 337.

22. In this case, we agree that the complaints are certainly contractual in nature. Indeed, this much appears to be acknowledged in the complaints themselves insofar as each alleges violations of the terms of the collective agreement "which have been frozen by virtue of section 79 of the Act." We are not faced, however, *only* or *merely* with allegations of a violation of the statutory freeze based solely on the terms and conditions of the collective agreement. The complainant has specifically pleaded that the actions about which it complains were taken by the respondent against the complainant's members *because of* their membership in, or support for the complainant. The complainant's position as disclosed in the pleadings and as argued before us is that Cuddy Food has engaged in a course of conduct against RWDSU supporters in a manner which does, or is designed to "interfere with the formation, selection or administration of the trade union" (section 64); that Cuddy Food has "discriminated against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union (the RWDSU) or was or is exercising any other rights under this Act", i.e., the right to assist in the displacement of the incumbent union (section 66(a)); that Cuddy Food has sought by "intimidation or coercion to compel any person to...refrain from exercising any other rights under this Act...", i.e., the right to assist in the displacement of the incumbent union or to select the RWDSU as their bargaining agent (section 70). It may be that in the final analysis the RWDSU will be unable to prove these allegations. At this stage, however, we are not prepared to say that the complaints are frivolous or vexatious and without a factual or legal basis. That is a matter ultimately to be determined on the hearing of the merits. The Board does, however, have a significant interest, indeed, a statutorily imposed duty, to ensure that in circumstances such as these, where one union is seeking to displace another, the employees are operating in a work environment and atmosphere which permits the employees to join the trade union of their choice -- whether that union is the incumbent union or the union seeking to displace the incumbent. The public interest in ensuring that employees are free to make such a choice is paramount to the Board and cannot necessarily be addressed through the more private grievance and arbitration process found in the collective agreement.

23. In addition to the public interest component of this case, it is apparent that in the circumstances of this case the remedies available to the complainant and the aggrieved persons should these matters be deferred may be inadequate. During the course of his submissions, counsel for Cuddy Food referred to the aggrieved persons as having "mis-elected" - although they could have

grieved they chose not to do so. Those employees must now bear the consequences of that mis-election. His response to a question from the Board as to whether the employer would seek to rely on any timelines arguments should we determine to defer to the process under the collective agreement was such as to indicate that the respondent employer did not appear to be prepared to waive its rights to raise timeliness arguments which would impact upon the arbitrability of any grievances filed. A deferral to the process in light of such a submission would therefore be illusory. The Board will not normally defer to the process under the collective agreement without assurances that the aggrieved persons have access to that process and have full opportunity to seek redress under that process or obtain a remedy using that process.

24. Similarly, and as was stated by the Board in the *Valdi Inc.* case, the “OLRB has an expansive remedial jurisdiction and most recently has developed a fairly sophisticated array of remedies including the posting of notices for the benefit of bargaining unit employees who may have been collaterally affected by an unfair labour practice directed at a fellow employee”. The remedy of a posting is unlikely to be awarded by a private board of arbitration selected or appointed under the collective agreement.

25. Our comments in respect of the possible inadequacies of the remedies available under the collective agreement process in the circumstances of this case are not meant to indicate a blanket acceptance of any argument that a deferral to the collective agreement process is inadequate because the RWDSU is not a party to the collective agreement, cannot invoke the grievance procedure or otherwise influence that procedure, and does not have the status to participate in that process. In this case, we find that the determination of significant statutory rights of the RWDSU, as well as the statutory rights of the employees underlie these complaints. In the absence of issues raising such significant statutory rights, and as indicated in paragraph 19 herein, we are not prepared to assume that the UFCW is unable or unwilling to seek full redress for aggrieved employees. In this regard, we concur with the early decision of the Board in *Collingwood Shipyards*, [1967] OLRB Rep. July 376. Although not cited in argument, that case involves circumstances similar to the case before us. There, five persons alleged that they had been discharged because of their membership in and support of a union seeking to displace an incumbent union. In dismissing the complaint the Board stated:

9. The complainant argued that even if the Board were to assume that the United Steelworkers of America would be “god-like” in the presentation of the arbitration case, which on the surface would appear to be contrary to their best interests, there are special circumstances in this case which distinguishes this case from the cases on which the respondent relied. The complainant argued that since it was not a party to the collective agreement no remedy was available to it under the collective agreement and CNTU is not a party to the arbitration proceedings. In addition, the complainant argued that the relief available to the aggrieved persons before the arbitration board is limited to the provisions of the collective agreement between Local 6320 and the respondent.

10. CNTU is a party to the proceedings in this case in a representative capacity. The rights of CNTU in proceedings before this Board under section 65 are no less nor are they any greater than the rights of the individual aggrieved persons whom CNTU represents.

11. There has been no allegation that the United Steelworkers of America have engaged in collusion or connivance with the respondent with respect to the actions taken by the respondent. It must be remembered that the individual grievors each signed a grievance which resulted in the arbitration proceedings which are pending. The aggrieved persons continue to be represented by the United Steelworkers of America which is a party to a collective agreement with the respondent, which provides in part that should “differences or disputes arise between the Company or any official of the Company and any Employee or group of employees regarding the interpretation or application of this agreement or for any other cause”, such differences or disputes should be settled by the grievance or arbitration procedures provided in the collective agreement. The

parties to the collective agreement are currently processing the dispute with respect to the aggrieved persons in accordance with the provisions of the collective agreement. This procedure is not only authorized by the collective agreement but is in accordance with the expressed intent of the Labour Relations Act under which the United Steelworkers of America is recognized as the sole and exclusive bargaining agent of the persons covered by the collective agreement.

12. The fact that CNTU is not a party to the arbitration proceedings is not a matter with which this Board can be concerned. As stated in *Re Hoogendoorn v. Greening Metal Products and Screening Company et al* 1967 1 O.R. 712 at 728, "an award given in pursuance of arbitration provisions of a collective agreement is not open to attack merely because interest adverse to the grieving union, other than the employer, were not represented."

13. We recognize that, in view of the allegations made by the complainant on behalf of the aggrieved persons, the United Steelworkers of America may find themselves in a most unenviable position in the arbitration proceedings. The United Steelworkers of America may be subject to the accusation that they did not lend their full support to the aggrieved persons in the arbitration proceedings unless the result is completely favourable to the grievors. Although invited to do so, this Board is not prepared to assume that the United Steelworkers of America will fail to fairly promote the interests of the aggrieved persons in the arbitration proceedings. This Board is also not prepared to assume that the arbitration Board will not make its award in accordance with the principles of natural justice. The Labour Relations Board is not empowered to sit in appeal on the arbitration board nor is it fitting that it should in any way impugn the composition of the arbitration board or any decision of the arbitration Board. It would be even more reprehensible for this Board to do so prior to the arbitration Board herring the matter and arriving at its decision.

14. If the United Steelworkers of America does not press the arbitration proceedings to a conclusion, or if it can be established that there has been a breach of duty of good faith representation by the United Steelworkers of America in the arbitration proceedings, or if the arbitration board finds on the evidence that it is without jurisdiction to deal with the matter, as the complainant suggests may happen, then in such circumstance, this Board may (although we have not so decided) entertain this complaint pursuant to the provisions of section 65 of the Act. However, until such time as the above events or events of a similar nature have been taken place the complaint by the complainant is untimely and cannot be entertained.

From a reading of the case it would appear that the primary reasons why the Board dismissed that complaint, and thereby in effect deferred to the collective agreement process, was because the five aggrieved persons had filed concurrent grievances which were already proceeding to arbitration.

26. Similar circumstances led to a similar result in *General Bakeries Limited*, [1967] OLRB Rep. Jan. 823, another early decision of the Board. Upon a request for reconsideration of that decision the Board stated:

1. ...The basis for the request is that the bargaining rights of the union *may* be terminated or that the union *may* not press the arbitration proceedings to a conclusion.

2. The fact that something may or may not happen in the future is not a reason in our view for changing our original decision in this matter. It may be, although it is not necessary for us to decide at this time and we do not do so, that if the bargaining rights of the union are in fact terminated and/or if the arbitration proceedings are not processed further, the complainant would have the right to request reconsideration or file a new complaint.

A third decision of the Board dealing with similar facts can be found in *Sunnybrook Food Market (Keele) Limited*, [1972] OLRB Rep. March 210. There the Board dismissed the application stating that the complaint by the complainant was "premature", the aggrieved persons had not yet filed grievances under the collective agreement. The Board stated that:

3. If, however, the aggrieved persons attempt to file grievances under the collective agreement above referred to and Local 206 refuses to process their grievances or if it can be established

that there has been a breach of duty of good faith representation by Local 206 or if it can be established that Local 206 and the respondent have engaged in collusion or connivance with respect to the actions taken by the respondent, this Board may (although we have not decided) entertain this complaint pursuant to the provisions of section 79 [now section 89] of the Act. However, until such time as the above events or events of a similar nature have taken place, the complaint by the complainant in this matter is premature and cannot be entertained.

27. Notwithstanding these earlier decisions of the Board (none of which were referred to by counsel in their argument), in the circumstances of this case, and in light of the alleged violation of significant statutory rights, we find that this is not an appropriate case for the Board to defer to the process established under the collective agreement. The Board will therefore hear this matter on its merits.

28. We wish to emphasize that a ruling on this preliminary motion should not in any way be construed as a prejudgment of the merits of the complaints, nor should it dissuade the parties from attempting to settle this case without resort to further litigation. It may be that the parties can amicably resolve the matters in dispute. After having digested the pleadings, we might observe that compared to problems normally raised during the course of a union's organizing drive, and certainly compared to the problems raised in the other proceedings involving these parties, the issues in this case appear to be relatively minor. We use the word "minor" not to denote that the issues are unimportant or insignificant to the complainant or the aggrieved employees. Not having heard the merits of the case, we certainly do not agree with counsel's comments that these claims are "spurious". What may appear to be a minor problem or "spurious" to one person can nevertheless be a significant or major issue to the persons affected. We merely observe that in our experience the issues in this case appear to be such that some acceptable settlement which will avoid the expense and uncertainty of litigation may be a possibility.

29. The matter is referred to the Registrar for rescheduling.

2601-87-OH; 2602-87-OH; 2603-87-OH Ron Murphy, Complainant v. Domtar Inc., Respondent; Pat Casey, Complainant v. Domtar Inc., Respondent; Don Chapman, Complainant v. Domtar Inc., Respondent

Evidence - Health and Safety - Miners required to report to dump point rather than refuge station in case of power failure - Workers sent home for refusing to work - No inspection carried out by respondent or inspector - Inspector's report issuing five days later without an inspection being done - Board ordering that inspector not compellable but allowing admission of evidence from other persons relating to what the inspector said or did - Work refusals justified - Compensation ordered

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *D. G. Wozniak* and *J. Sarra*.

APPEARANCES: *P. Turtle*, *John Booker* and *Patrick Casey* for the complainants; *Razvan L. Theodoru*, *Donald E. Dickie*, *Hugh Secord* and *Jean Lameureux* for the respondent; *William K. Lightfoot* and *Andrea Esson* for Marcel Djivre.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER J. SARRA;
August 5, 1988

1. These matters are three complaints filed under section 24 of the *Occupational Health and Safety Act* ("O.H.S.A.") alleging that the complainants were suspended because they refused to work under unsafe conditions pursuant to section 23 of that Act.

2. The respondent operates a gypsum mine in Caledonia, Ontario which produces some 700,000 tons of gypsum annually. Approximately eighty people are employed in the mine, including the three complainants. The electrical system servicing the mine is old, and at the time of these events had become overloaded as a result of expansion. Consequently there were frequent localized power failures in the mine in the late summer and early fall of 1987. The number of power failures were estimated by Donald Dickie, the respondent's mine superintendent, at ten per week, and by the complainants at one to four per day. The power failures lasted some three to ten minutes each, depending on how long it took for an employee to reset the breaker. In addition, there had been a rash of small equipment fires in the mine during the same period.

3. The mine is equipped with a fire alarm system consisting of flashing beacons and sirens. Prior to the events which gave rise to these complaints, the complainants were under the impression that the fire alarm system was connected to an electrical circuit independent of the general electrical system in the mine, and that it would therefore continue to operate in the event of a power failure. Indeed, two of the complainants had received assurances to this effect some months previously from Vic Bochmeier, the respondent's health and safety officer. On the morning of November 26, 1987, the respondent conducted a routine fire drill during which a power failure occurred. The respondent and the respondent's employees then discovered simultaneously that the fire alarm system did not function during a power failure. It is fair to say that this caused considerable concern on the part of both employees and the respondent. Shortly thereafter, production ceased in the mine and employees went to a refuge station. The complainants were not present at this time as they worked other shifts. Lorne Frost, the respondent's mine captain, spoke to Carl Booker, an employee who was also Co-Chair of the respondent's Joint Occupational Health and Safety Committee ("JOHSC") and suggested that the problem be discussed at a JOHSC meeting which had been previously scheduled for the morning of the following day. Mr. Booker concurred in this proposal and as a result, production resumed.

4. Mr. Frost and Mr. Dickie then discussed a contingency plan for alerting the work force of a fire in the event of a power failure. They came up with what both described as a "concept" to take to the meeting the following morning. Mr. Dickie testified that he felt the JOHSC was the proper forum for discussion of the concept because the individuals there had knowledge of the mine, and the JOHSC was empowered to make recommendations. The concept itself was first described by Mr. Frost in the following terms. In the event of a power failure, workers would report to the nearest "dump point", a crusher area in the mine which includes a battery-operated pager telephone providing communication to an attendant on the surface. One of the employees would telephone the attendant to determine the extent of the power failure. If it was localized, and if ventilation was adequate, employees would leave someone in charge of the pager telephone, leave their names and work locations with that person, and return to work. The evidence indicated that the ventilation requirement was necessary because ventilation fans do not function during a power failure.

5. At eight o'clock the following morning, Mr. Dickie received a call from Gord Allen, an inspector with the Ministry of Labour's Mining Health and Safety Branch. He advised Mr. Dickie that he was planning to investigate a call received the previous evening from Art McKenzie, an employee, in regard to gaps in the fire alarm procedure. Mr. Dickie, who was unaware that the call had been made, told Mr. Allen that the JOHSC would be meeting that morning, and that this problem was one item on the agenda.

6. At the JOHSC meeting, Mr. Frost presented the concept that Mr. Dickie and he had discussed to the participants, which included Pat Casey, a complainant in these proceedings and the acting Co-Chair in the absence of Mr. Booker, Don Chapman, also a complainant, and Art McKenzie, all representing employees. The respondent was represented by Mr. Frost, Co-Chair, Mel Senner and Gary Elliot. The employee representatives were not in agreement with the respondent's proposal which they found vague and unclear. In their view, when a power failure occurred, employees should go immediately to the closest refuge station until power was restored. Mr. McKenzie advised the meeting that he had spoken to Mr. Allen the night before, and asked for information about what employees should do in the event of a power failure. According to Mr. McKenzie, Mr. Allen had recommended that employees go to the nearest refuge station. Among other things, Mr. Casey pointed out that the pager telephones at dump points were often not working properly, and that the plan involved delays which might be dangerous in the event of a fire. He was also concerned that employees might not be aware of the power failure for some time. The evidence indicated that some 30 per cent of employees work with diesel equipment in headings at the rock face away from lighted areas, so they would not necessarily either see lights go out or hear the ventilation fans going off, although the Board was advised that the ventilation problem would become apparent shortly because of a reduction in the volume of air. There is no back-up lighting system during a power failure, although employees wear cat lamps on their hats.

7. The distinction between the two plans from the employees' point of view lay in the difference between refuge stations and dump points. Refuge stations have cement and rock walls, are equipped with air lines, lighting, potable water, medical and other emergency supplies. They have pager telephones, are insulated against fire and can be sealed off with clay to keep out smoke. Dump points have only pager telephones, a latrine, a first aid box and a stretcher, and are essentially identifiable locations in the mine where blasted rock is dumped into a crusher. They are not self-contained areas.

8. Mr. Frost advised the meeting that the respondent was not in agreement with the refuge station proposal because the closest refuge station was farther than the nearest dump point from the area in which employees were working, and such a plan meant increased travel time for employees. This was a problem because power failures were so frequent, and indeed in some cases the power might be restored before employees reached the refuge station. The evidence indicated that the closest refuge station was from 500 to 1000 feet farther from where most of the crew were working than the nearest dump point. It appears from Mr. Frost's estimates that it would take between two to four minutes longer for employees to walk to the refuge station. Mr. Frost was also concerned that employees would be reluctant to leave the refuge station once they arrived there.

9. The JOHSC did not reach agreement on either the respondent's plan or the employees' plan. The employee representatives in attendance requested that a health and safety inspector be brought in. However, Mr. Frost testified that the respondent disagreed because it felt the problem should be resolved between the parties. It is not clear whether this view was presented at the meeting. Mr. Casey left with the impression that an inspector would be called in. After the meeting, and because he was concerned that no agreement had been reached, Mr. Dickie contacted Marcel Djivre, who is both an inspector, and the Area Engineer for the Mining Health and Safety Branch of the Ministry of Labour. He is also Gord Allen's superior. Mr. Dickie informed Mr. Djivre of the problems revealed by the fire drill, of Mr. Allen's advice to employees and of the fact that JOHSC had not agreed upon a contingency plan. Mr. Dickie reviewed the respondent's concept and he and Mr. Djivre compared it to section 23 of Regulation 694 under the O.H.S.A. for Mines and Mining Plants.

10 According to Mr. Dickie, Mr. Djivre told him that it was the respondent's responsibility

to formulate a sound emergency plan. Since the regulations were no more specific than this, he felt Mr. Dickie's plan was acceptable and asked Mr. Dickie to send him a copy of the plan. He also said he would not send an inspector to the mine until the middle of the following week, and that the respondent should fully utilize the internal responsibility system, that is, work with employee representatives and the JOHSC to resolve it. Mr. Dickie testified that Mr. Djivre told him to send a confirming letter to the inspector to the effect that the plan was acceptable and that there were no further grounds for a work refusal.

11. On November 29th, a shift including the three complainants was scheduled to commence at 11:00 p.m. under the supervision of John Lecoupe, a mine foreman who has since left the employ of the respondent. Mr. Lecoupe arrived at approximately 10:15 p.m. and went to his office. Since he had been off work for three days previously, Mr. Frost had written a note to him in the captain's log book to the effect that there was a new contingency fire plan, and that Mr. Lecoupe should speak to Gary Elliot, the foreman of the proceeding shift, to get the details of that plan. If he had any questions, Mr. Lecoupe was to phone Mr. Frost at home. While Mr. Elliot and Mr. Lecoupe were discussing the plan, Mr. Casey came into the office, initially to ask about a shortage in his pay. He then entered into the discussion, laying out some of his concerns and suggesting that the refuge station plan was safer. Mr. Lecoupe agreed that it was a good idea. Mr. Casey then went and changed into his work clothes to go underground. In the meantime, Mr. Lecoupe telephoned Mr. Frost, who explained the respondent's plan in more detail than that provided by Mr. Elliot. That explanation took the following form, which was later relayed to employees. If the power failed, crews were to go to the dump point. The dump point operator would then call the surface to find out if the power failure was localized or mine wide. If it was a localized power failure, employees were to give their work locations to the dump point operator and return to work, providing ventilation was adequate. Should an emergency such as a fire or a total power failure arise, the dump point operator would go and find the men in the headings, and they would go to a refuge station. A mine wide power failure constitutes an emergency because the mine's air supply is cut off.

12. Mr. Casey returned to the foreman's office in his work gear and Mr. Lecoupe advised him that the respondent's contingency plan would be implemented. Mr. Casey expressed a number of his concerns about the plan, to which Mr. Lecoupe responded that there was no fire or power failure at that moment. He then phoned Mr. Frost again to advise him of Mr. Casey's concerns and subsequently advised Mr. Casey that the respondent's contingency plan would stand. Mr. Casey responded that in that case, he would have to refuse to work under the O.H.S.A., and that he wanted to consult with his shift health and safety representative, who happened to be Mr. Chapman.

13. Mr. Chapman then attended at Mr. Lecoupe's office and was also advised of the respondent's contingency plan. He indicated his own unhappiness with it as well and told Mr. Lecoupe that it was better to be safe than sorry, and that he thought going to the refuge station was a better plan. Mr. Lecoupe agreed that it was better to be safe than sorry, but said that he had to follow Mr. Frost's orders. Mr. Chapman also refused to work and told Mr. Lecoupe that he should canvas the other employees.

14. Since Mr. Frost had also told Mr. Lecoupe to make sure employees were informed of the respondent's contingency plan, Mr. Lecoupe went to the "dry" where the crew was assembled (except for the maintenance men who had already gone underground). Employees there were engaged in a lively discussion of the respondent's plan. Mr. Lecoupe explained the problem that the fire drill had revealed, related the company's contingency plan as Mr. Frost had described it, told employees that the Ministry of Labour had approved the plan, and advised them that Mr.

Casey and Mr. Chapman had refused to work. He then polled each employee in turn as to whether they were prepared to work. All but two refused. Mr. Lecoupe returned to his office to call Mr. Frost again.

15. Mr. Frost advised him not to do anything until he called back. In the meantime, Mr. Elliot, who had remained during these events, told Mr. Lecoupe in the presence of Mr. Chapman that he thought it was not a bad idea to go to the refuge station and that he would be willing to back Mr. Lecoupe on it with management. Mr. Elliot also suggested that Mr. Lecoupe let employees use a refuge station for that night until management could work the problem out and get something down about the plan in writing. Mr. Lecoupe testified that he made it clear to Mr. Elliot that although each of them may have had their own ideas, the respondent's formal procedure would be followed. While going to a refuge station that night was the obvious and easy solution according to Mr. Lecoupe, it amounted to avoiding the issue.

16. In the meantime, Mr. Frost had called Mr. Dickie (one of a number of calls between the two men that night) who advised the former that this was not a legitimate work refusal, but rather frivolous insubordination which would result in discipline. He told Mr. Frost to tell Mr. Lecoupe to instruct the crew to work, and that anyone who refused to work was to leave the respondent's property. Mr. Dickie also told Mr. Frost that the employees' health and safety representative could call Mr. Djivre who had accepted the respondent's plan. Mr. Frost relayed this information to Mr. Lecoupe and told him that the respondent's contingency plan would stand. Mr. Lecoupe told Mr. Frost that John Booker, another employee, and Mr. Casey were quite upset and that Mr. Booker wanted an inspector to come out to the mine site. Mr. Frost then relayed Mr. Dickie's suggestion that the health and safety representative call Mr. Djivre. At that point Mr. Booker assumed the role of employee health and safety representative from Mr. Chapman because of the former's experience, and he had a somewhat heated conversation with Mr. Djivre on the telephone for a few minutes. According to Mr. Lecoupe, the conversation consisted mostly of Mr. Booker accusing Mr. Djivre of "making a deal" with the respondent. Mr. Lecoupe testified that he then took the telephone and Mr. Djivre told him that he had spoken to Mr. Dickie, he was not sending an inspector out and there was no valid work refusal. Mr. Djivre also told Mr. Lecoupe that he would be coming out to the mine within a few days and that within that time Mr. Dickie should draft a formal proposal for the contingency plan.

17. Mr. Lecoupe then went back to the dry area and announced that the Ministry of Labour was not going to send an inspector and that the Ministry of Labour was backing the company. He then relayed Mr. Dickie's directions and comments with respect to frivolous insubordination and discipline. At that point, only Mr. Casey, Mr. Chapman and Ronald Murphy, the third complainant, continued to refuse to work. Mr. Murphy was a dump point operator at the time in question. He only became aware of the gap in the fire alarm system when Mr. Lecoupe addressed the crew in the dry area. When he was polled by Mr. Lecoupe, he declined to work as a result of his own concerns about the adequacy of the contingency plan.

18. All three men who continued to refuse to work were told to leave the property and to report to work the following day. The following morning, November 30, 1987, at 7:00 a.m., Mr. Dickie met with Mr. Lecoupe and Mr. Frost and decided to discipline the complainants. Mr. Dickie also spoke to Mr. Djivre that day, advising him of the work refusals and the discipline, and reviewing the substance of their earlier conversation. At that point, Mr. Djivre was unclear about the locations of the dump points and the basic layout of the work area, so Mr. Dickie described it to him in general terms which did not go into the specific area where the men were working.

19. On that same day, November 30th, Mr. Dickie and Mr. Frost drafted the following contingency plan:

#2 Mine 324 Underground Fire/Emergency Contingency Plan

In the event of power outage or warning system failure, the following procedure shall apply:

- All workers shall proceed to the dump point in their work area.
- On arrival the senior person shall call the hoistman and/or C4 crusher and shop, as required, to determine the extent of the power outage or warning system failure and the areas affected.
- The hailer phone shall be tested to ensure it is working.
- The senior person, or person so designated by the Foreman will attend the phone for the duration of the power outage or warning system failure.
- All workers shall contact the person attending the phone. At this time each worker will communicate to the attendant the area in which he/she will be working so they may be contacted if necessary. They shall again contact the attendant before relocating to another work area, to notify said attendant of the new work location.
- In the event of an emergency, the hoistman, or crusherman shall contact the designated attendant in addition to activating the alarm system.
- The attendant will cause notification to be given to all persons and the requirements of the fire/emergency procedure shall apply.
- The foreman shall be notified as soon as possible after implementation of the contingency plan.

NOTE: In all cases, return to work areas is subject to provision of adequate ventilation for equipment to be used in each area.

20. Later on November 30th Mr. Dickie wrote to Mr. Djivre as follows, enclosing the contingency plan:

Further to our telephone conversations of November 27 and November 30, 1987 regarding fire and emergency procedures, please note the following;

Domtar Caledonia mine has a beacon and siren system to notify underground workers of a fire. A recent fire drill was initiated at a time when the power u/g was off in localized areas. This drill indicated to us that a contingency plan is required. Such a plan was discussed but unfortunately unresolved at the JHSC meeting November 28, 1987. Attached is a written draft outline of this contingency plan.

The overall u/g fire/emergency procedure will be revised to incorporate this plan.

From our conversations I understand the MOL is in agreement with the attached plan. This contingency plan conforms with section 23(2) of the Regulations for Mines and Mining Plants. It was also confirmed that it was unnecessary for an inspector to intervene immediately. Also employees not agreeing with the plan do not conform to the work refusal section of the Act as the health and safety of those employees is not in jeopardy.

The contingency plan places backup people near an u/g phone system. That person(s) is then in a position to notify anyone in the area of an emergency. I am confident that under such a program, it is possible to notify everyone within 10-15 minutes of becoming aware that an emergency exists.

Based on the backup plan, Caledonia mine definitely conforms to section 23 of the regulations. We are also upgrading our electrical system to minimize power failures. Other methods will be assessed to provide backup to the existing system.

Note, the electrical system at Caledonia Mine is being updated to minimize power failures and backup systems will be assessed.

A copy of the contingency plan will be posted, a copy will be given to the JHSC, and all employees will be instructed on this procedure by December 1, 1987.

I trust this continues to meet with your approval. This procedure will be available for your review during your visit of December 2, 1987. At such time we will involve a member of the JHSC for input on any possible revisions. I would recommend that the procedure be formally reviewed by the JHSC following our December 2nd meeting.

21. Mr. Djivre wrote back on December 6, 1987 as follows:

In response to your letter dated Nov. 30, 1987, regarding the establishment of a Fire/Emergency contingency plan, and our telephone conversations of Nov. 27, and Nov. 30, 1987, the following comments are made:

From our conversations, it was my understanding that you were going to provide radio communications to alert your workers of an emergency or fire when the power underground is off. The details of your plan in my opinion should be resolved by the Joint Health & Safety Committee and/or the employer.

Assessment report no. 02964 further clarifies my position in this regard. Further to our conversations of Dec. 4, 1987, I understand that in the interim period workers will be advised to go to the refuge station in the event of a power outage.

Please consult the Papers presented at the Comm-Lite Seminar on Nov. 24, 1987, in Sudbury for examples of effective portable radio communications systems in underground mines.

Should you require further advice in the near future, either myself or Mr. Walter Hitchman, Mining Engineer, may be consulted.

22. On December 1st, the day after the complainants' refusals, the respondent posted the written contingency plan on Mr. Djivre's instructions. Also on December 1st, Mr. Murphy and Mr. Chapman were sent letters suspending them for one day each as a result of their work refusals. Mr. Casey was sent a similar letter suspending him for three days on December 4, 1987. Mr. Chapman, who also refused to work on November 30th, was sent home again on that date.

23. Mr. Djivre attended at the mine on December 4th. He performed no inspection, but rather met with company officials and prepared a report. The meeting was originally scheduled to include employee health and safety representatives, but they arrived late. By the time they appeared at the meeting, Mr. Djivre had completed his report which he then presented to them. That report reads as follows:

Concern Regarding Section 23(2) of the Mining Regulations.

On or about November 29, 1987 the writer received a phone call shortly before midnight from Mr. John Booker, Union President to notify a refusal to work. During discussions with both Messrs. John Booker and John Lecoupe, foreman, the following facts were revealed.

- a) There was no fire underground.
- b) The power was on and the regular alarm system was operational.
- c) The back-up radio communication system was present in the event of power outage.

Considering the above facts, the writer concluded that these did not appear to be a refusal to work condition as described under Section 23 of the Act.

It is the employer's responsibility to provide the procedures and the alarm system required by Sect. 23 of the Mining Regulations.

The report of each fire alarm test of the procedures mentioned in Sect. 23(5) of the Mining Regulations shall be sent to an engineer of the Ministry.

Recommendations

1. The writer recommends that the back-up fire alarm system be tested and improved if found necessary.
2. The joint Health and Safety Committee be involved in the procedures and design of the fire alarm systems.

Note: Item c) was communicated verbally to the workers on Nov. 29/87.

24. At no material time was an inspection carried out by either the respondent or an inspector. Since the refusals, it appears that some employees have continued to go to the refuge stations when the power has failed without repercussions. However, the power system has been modified so that localized power failures are much less frequent.

25. Mr. Casey's concerns about the contingency plan were as follows. The overloading of the electrical transformers which was causing the power failures presented a two-fold problem. Mr. Casey was concerned that the overloading might lead to both a fire and a power failure simultaneously. He was also concerned that the history of small fires and the frequency of the power failures made it all the more important that a plan was adequate. Mr. Casey uses the pager system at least once a night, and he told the Board that frequently the pager telephones do not work at all, or communication is garbled. He was also concerned about the role assigned to the dump point operator in trying to find employees. To walk all the way around the headings to notify employees would take ten to fifteen minutes, which in his view would amount to a dangerous delay in the event of a fire, both for employees located towards the end of this tour and for the dump point operator. A delay of this length could well cut an employee off from an escape route depending on the location, direction and size of the fire.

26. Mr. Chapman described his concerns in the following manner. As one of the shift health and safety representatives, Mr. Chapman was required to make out joint reports with the foreman on any fires which occurred, and so he was aware of the number of fires which had occurred prior to these events. In addition, a fire in a mine can rapidly deplete the usable air supply because of attendant smoke, gases and fumes. The nature of Mr. Chapman's work meant that he might be in any one of twenty different work areas during a shift, and it would be difficult for the dump point operator to find him. If one of the transformers blew up as a result of overloading, there would be no fire alarm, and if a fire was heading in the crew's direction, the surface attendant would not know of it unless someone below discovered the fire and reported it to him by pager telephone. Mr. Chapman was particularly apprehensive because of a newspaper report which he had read several months previously of a fire in a similarly constructed mine in Ontario where two workers had died because they were unable to reach a refuge station in time. He also testified that he had experienced problems with the pager telephone not working the night before these events.

27. Ronald Murphy's concerns were in part based on his experience as a dump point operator. He used the pager telephone some five to ten times per shift, and related to the Board a number of ongoing problems with either the transmitter or receiver not working properly. In this regard, he described a pattern where the telephones would fail to work properly two to three times in one shift. Repairs would be effected and the telephones would work well for a couple of days, and then break down again. Mr. Murphy was also very concerned about the aspect of the contingency plan in which he, as the dump point operator, would have to locate men in the headings if there was an emergency. Mr. Murphy had not been in the headings at all for over a year on November 29th, 1987, and it was not disputed that the headings changed constantly as work progressed. He would have to walk around the headings as well, a slower process, since the evidence indicated that the mobile machinery cannot be used when ventilation fans stop because of fumes. It

was apparent that Mr. Murphy had been concerned about the transformers overloading for some time previously, and he was particularly disturbed that in his view, untrained employees were resetting the breakers, a job which required an electrician above ground. He had spoken to an electrician (not employed by the respondent) who had advised him that the transformers, which carry 2400 volts, might explode if the resetting of a breaker caused a spark to ignite smoke from a short in the wires. Mr. Murphy had raised this problem before with Mr. Lecoupe, and had himself refused to reset the breakers, without repercussions from management. Even the smoke alone from the overloaded transformers might cause problems in Mr. Murphy's view. He advised the Board that he had been given mine rescue training by the respondent, in the course of which he had become aware of the explosive properties of smoke and the small amounts of toxic smoke that might kill a person in the limited air supply of a mine. There are transformers both downwind and upwind of the area in which the crew was working.

28. Sections 23 and 24 of the O.H.S.A. provide as follows:

(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or

- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

29. In *Inco Metal Co.*, [1980] OLRB Rep. July 981, the Board in considering the predecessor to these sections said that it “must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy”. After reviewing those shortcomings at some length, together with the social and human toll taken by industrial accidents and their adverse impact on the economy, the Board concluded that the predecessor provisions “must be given a liberal and constructive interpretation that is consistent with the intent of the legislation”.

30. Similarly, the Board observed in *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834:

We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues at the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a “neutral” official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals....

The Board has commented that initially an employee may refuse work which he or she has reason to believe is unsafe, a test which is subjective in its nature (see, for example, *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). Where there is such a refusal, the employer is required to investigate the matter forthwith in the manner set out in section 23. Following that investigation or steps taken to deal with the circumstances that prompted the work refusal, the worker may continue to refuse if he or she has reasonable grounds to believe that the work is unsafe. The Board has concluded that this subsequent test is an objective one, and has adopted this enunciation of the test set out in *Inco Metals*, *supra*, with respect to the predecessor legislation (see for example, *Camco Inc.*, [1985] OLRB Rep. Oct. 1431):

59. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

Where the worker continues to refuse, an inspector is required to investigate the refusal in the

presence of the employer, the worker and an employee representative after which the inspector gives his or her decision in writing to the parties.

31. The Board has held that the reasonableness of an employee's belief may be affected by an inspector's decision. (*Auto Jobbers Warehouse Ltd.*, [1981] OLRB Rep. Dec. 1715.) In this regard, the Board has noted that an employee is entitled to continue to refuse to work even after an inspector's report declares the workplace to be safe as long as he continues to have reasonable grounds to do so. However, a worker who refuses to work where there has been an investigation and a decision by a neutral expert that the work is safe faces an increasing onus with respect to the reasonableness of his or her position (see *Canadian Gypsum Construction*, [1978] OLRB Rep. Oct. 897). That onus is still subject to the general burden of proof that the employer bears under section 24 (see *The Corporation of the City of Toronto*, *supra*).

32. At no stage must an employee be proven correct with respect to the safety of the work. Rather, in *Inco*, *supra*, the Board said that it will look at the reasonableness of the employees' views in light of the information available to the worker at the time of the refusal:

The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work....

See also *Imperial Oil Ltd.*, [1982] OLRB Rep. Apr. 580, and *Wilco Canada Inc.*, [1983] OLRB Rep. Oct. 1759 in this regard.

33. At the commencement of the hearing, a preliminary issue was raised with respect to the subpoenaing of Marcel Djivre by the respondent. Counsel for Mr. Djivre submitted that he was not a compellable witness as a result of section 34(2) of the *Occupational Health and Safety Act*. That section reads as follows:

34.-(2) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector, is not a compellable witness in a civil suit or any proceeding, except an inquest under the *Coroners Act*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

34. There was no dispute that Mr. Djivre had been duly served with the respondent's subpoena. While section 34(2) stipulates that an inspector is not compellable, it does not say that he or she is not competent in the legal sense to testify as a witness. However, counsel for Mr. Djivre made it clear that he was not prepared to volunteer testimony for the policy reasons described below, and thus it was his compellability which was at issue.

35. The respondent was initially of the view that Mr. Djivre was not an Occupational Health and Safety inspector at all, but rather an Area Engineer for the Mining Health and Safety Branch of the Ministry of Labour. Upon production of Mr. Djivre's certificate of appointment as an inspector under the O.H.S.A., the respondent took the position that he had not been acting in that capacity at the time of his involvement in the events at issue, but rather in the advisory capacity of an Area Engineer, and thus he was not protected by section 34(2). Counsel for Mr. Djivre and the complainants argued that the provision of advice was a significant portion of an inspector's duties and that the respondent's characterization of an inspector's role was too narrow. The Board then ruled orally as follows:

The respondent in this case argues that Mr. Djivre was not acting in his capacity as an inspector in regard to certain events and that the respondent is entitled to call him as a witness with respect to those events, despite the existence of section 34(2) of the Occupational Health and Safety Act. Section 34(2) does not differentiate between an inspector who is acting in his or her capacity as an inspector and one who is not.

There are three elements to section 34(2) which would allow a duly subpoenaed witness to qualify for an exemption:

- (1) He or she must be an inspector, or a person who accompanies him or her, or does certain things at the inspector's request;
- (2) The proceedings must be a civil suit or any "proceeding";
- (3) The evidence for which he or she was subpoenaed must be in respect of any information, material, statement or test acquired, furnished, obtained, made or received under the Occupational Health and Safety Act or regulations.

It is now common ground that Mr. Djivre is an inspector. The cases of *General Motors of Canada Limited*, [1985] OLRB Rep. Feb. 262, and [1984] OLRB Rep. Mar. 459 make it clear that an inquiry into a complaint under section 24 of the *Occupational Health and Safety Act* by the Ontario Labour Relations Board is a "proceeding" within the meaning of section 34. If there is a dispute with respect to whether the evidence the respondent wishes to adduce falls within the last condition of section 34(2) we are prepared to hear and determine that dispute. We are not prepared to entertain evidence on whether Mr. Djivre was or was not acting in his capacity as an inspector, as in our view, that is the wrong question to be answered with respect to this preliminary issue.

36. Counsel for the respondent then advised the Board that he wished to call evidence to show that the evidence for which Mr. Djivre was subpoenaed was not in respect of any information, material, statement or test acquired, furnished, obtained, made or received under the *Occupational Health and Safety Act* or regulations. However, to establish that proposition, counsel wished to call Mr. Djivre as a witness. The Board then ruled orally as follows:

We are not prepared to allow the respondent to call Mr. Djivre to adduce evidence directed at whether Mr. Djivre is a compellable witness or not. The respondent has indicated he can address this evidence through other witnesses, and to allow the respondent to call Mr. Djivre in this manner would undermine the purpose of section 34(2).

37. The Board then heard the other evidence adduced by the respondent with respect to the nature of Mr. Djivre's involvement in the events which form the subject of these complaints and ruled as follows:

We find that Marcel Djivre is not a compellable witness in these proceedings by virtue of section 34(2). Our reasons will follow at a later date.

We now provide our reasons.

38. The Board has observed previously that there are sound policy reasons for giving section 34(2) a liberal construction. In *General Motors of Canada Limited*, [1985] OLRB Rep. Feb. 262, the Board said as follows:

As noted in our earlier ruling, if an inspector is to be able to perform his important functions under the Act, he must be able to freely obtain information from persons in the workplace and carry out his other tasks in a context in which neither he nor the persons with whom he speaks or interacts will feel constrained by the possibility that he may subsequently be compelled to testify at the instance of one of the parties to proceedings such as a complaint under section 24 of the Act. Moreover, as submitted by Mr. Rolph, the protection provided by section 34(2) of the Act ensures that the inspector's position as a neutral investigator and decision-maker will not be tarnished by the appearance of partisanship which could result if he were required to testify at the behest of an employee, an employer, or a union, in a civil suit or administrative proceeding, such as the present complaint, respecting any information, material, statement or test acquired, furnished, obtained, made or received under the Act or the regulations. Thus, we are of the view that the interpretation that we have placed on section 34(2) in our previous ruling and in the present ruling is the type of "fair, large and liberal construction or interpretation" mandated by section 10 of the *Interpretation Act* and best suited to attaining the object of the Act according to its true intent, meaning, and spirit.

39. In this case, the essence of the respondent's argument is that Mr. Djivre was not carrying out an inspector's formal functions under section 23 at the time of his various discussions with the parties, and was therefore not protected by section 34(2). We do not find this particularly persuasive. Section 34(2) on its face is not restricted to those duties performed by an inspector under section 23. Rather, it is broadly drafted to encompass, among other things "any information...acquired...under this Act or the regulations." The evidence before us was that Mr. Dickie initiated contact with Mr. Djivre by calling the Mining Health and Safety Branch. His call was prompted by Mr. Allen's call indicating that an inspection would be forthcoming, and it was clearly an attempt to forestall that inspection, at least until the JOHSC had had a chance to discuss the problem. Mr. Dickie also agreed that he was attempting to obtain Ministry of Labour approval for the respondent's contingency plan and that he and Mr. Djivre compared the plan to the mining regulations under the O.H.S.A. In addition, Mr. Dickie agreed that he anticipated the possibility of further work refusals, and it was apparent that he wished to obtain an official view of the validity of those refusals in advance.

40. Mr. Djivre's conversations with Mr. Booker and Mr. Lecoupe on November 29th were occasioned by the work refusal, and the latter was suggested by Mr. Dickie for the purpose of persuading employees to abandon their refusal. Mr. Djivre's discussion with Mr. Dickie on November 30th once again related to what Mr. Dickie had done and should do in the aftermath of the refusals in light of the respondent's obligations under the Act and regulations. On his visit to the plant on December 4th he issued a report which is titled *Ontario Ministry of Labour, Mining Health and Safety Branch, Report*. At the bottom of the report there is a statement which reads "[t]ake notice that you are required under the *Occupational Health and Safety Act*, to post a copy of this report in a conspicuous place."

41. In our view, evidence with respect to these activities is information acquired under the aegis of the O.H.S.A. Keeping in mind the purpose of section 34(2) and the fair, large and liberal construction that it should receive, we do not think it is necessary for a person claiming the protection of section 34(2) to point to a specific section of the O.H.S.A. authorizing his or her activities before such protection will be extended. It makes little sense in terms of the policy implications of section 34(2) to hold that an inspector's evidence with respect to a formal investigation is beyond the reach of a subpoena but his or her evidence in regard to informal advice or consultation is not. The information which the respondent wished to adduce through Mr. Djivre was closely linked to the respondent's and complainants' respective rights and obligations under the Act and regula-

tions, and to a sequence of events in which the parties were purporting to assert those rights or perform those obligations. While we do not suggest that this is an exhaustive or definitive test with respect to evidence falling under section 34(2), in our view it is at least sufficient to invoke its protection. We find confirmation for this view in *General Motors, supra*, where the complainants sought to compel an inspector to testify with respect to a number of events surrounding an investigation under section 23, including communications with the complainants after he had completed his formal functions and had delivered his report. The Board found that the evidence directed at these latter communications fell within the protection offered by section 34(2).

42. We note however, that under section 34(2), the information, material and so forth enumerated therein is not itself subject to restrictions on admissibility. In this regard section 34(2) may be compared usefully to section 111(1) of the *Labour Relations Act* which provides that certain material cannot be revealed except with the consent of the Board. In other words, the information itself is not confidential or protected, but only the compellability of an inspector to testify about it. As a result, we allowed the admission of evidence from other persons relating to what the inspector said and did, over the objection of Mr. Djivre's counsel.

43. We did so for two reasons. First, the evidence was otherwise highly relevant to the issues before us. In this regard we note in particular the increasing onus described above which is inseparable from the activities of the inspector. Second, while we are cognizant of the need to interpret section 34(2) so as to give effect to its purpose, at the same time it is important not to place such a widely- drawn construction upon it that it interferes any more than is necessary with the Board's function of ascertaining the facts of the case. Counsel for Mr. Djivre objected on the basis that admission of such evidence, whether or not it was specifically exempted in section 34(2), would have the effect of diluting its impact. We acknowledge that this may well be so. At the same time it is vital to the Board's ability to adjudicate a matter properly to have as unrestricted and accurate a view of the facts as is possible. In our view, our ruling provided an appropriate balance between the policy reasons for section 34(2) and both the Board's general obligation to accept relevant evidence and the importance of this evidence to the issues before us.

44. One further caveat with respect to this evidence; it will be readily apparent that testimony by another with respect to what an inspector has said is subject to a number of weaknesses, not the least of which is that it is hearsay, and the originator of the statement has not been subjected to examination. In addition, evidence with respect to the conversations with both Mr. Djivre and Mr. Allen was given after our ruling, when witnesses were aware that they were in no danger of being contradicted by an inspector. We took these factors into account in assessing the weight to be accorded to this evidence.

45. Turning to the facts of this case, we must first determine whether the complainants had "reason to believe" the workplace was unsafe within the meaning of section 23(3). We have little difficulty in concluding that this subjective test has been met. There had been a series of both small fires and power failures prior to these events and it had been demonstrated that the fire alarm system did not operate during a power failure. In these circumstances, it was not disputed that some auxiliary plan or system was required. The concept presented to the JOHSC meeting was hastily conceived of by Mr. Frost and Mr. Dickie to respond to what was obviously a labour relations problem of some urgency. The concerns raised by the complainants were sincere, and on the basis of the evidence before us, were not without merit. After reviewing the concerns at some length, we conclude that the complainants had reason to believe that the physical condition of the workplace was likely to endanger them within the meaning of section 23(3).

46. We have some doubt as to whether the respondent's actions on the evening of Novem-

ber 29th amounted to the kind of investigation which would trigger the objective test set out in section 23(6). However, it is not necessary for us to decide this issue as in any event we conclude that the objective test under section 23(6) has been met for the same reasons described above. Having reviewed all the circumstances including the frequency of fires and power failures, the possible consequences to employees, the difference in the characteristics of the refuge station and the dump point and the nature of the complainants' concerns, we conclude that the complainants had reasonable grounds to believe that the physical condition of the workplace was likely to endanger themselves.

47. With respect to the complainants' concerns, the respondent argued that the dump point operator could also use the scoop tram operators to locate workers in the headings. However, this was not part of the plan that was either set out at the JOHSC meeting or put to the crew on the evening of November 29th. In addition, it conflicts with testimony that mobile equipment is not used during a power failure because of the danger of fumes while the ventilation fans are not operating.

48. In a later description of the plan Mr. Frost described the first call to the surface as also verifying that the pager telephones were working. Mr. Lecoupe was of the view that if the pager telephone was not working at the dump point, "common sense" would tell workers to proceed to a refuge station. However, he agreed that this was not suggested to the crew at the time in question, and this argument ignores the fact that the complainants' common sense was telling them to go to a refuge station immediately, a course of action which the respondent vetoed. There was nothing in the way the plan was presented to employees that suggested that they should exercise their own discretion and judgement at any point in the procedure; in fact, the circumstances and the conduct of the respondent indicated that the exercise of their own judgement was distinctly unwelcome.

49. The respondent also argued that the refusals were based on a hypothetical state of affairs, and points out that there was no fire or power failure at the time of the complainants' refusals. We find this an unpersuasive argument for two reasons. Firstly, many work refusals anticipate the possibility of accidents or other breakdowns before they occur, and section 23 appears to contemplate that possibility. It would be nonsensical for the Board to conclude that the refusals were unprotected simply because the feared events had not yet come to pass. Rather, the Board's function is to assess the reasonableness of that anticipation in light of the facts before it. In this assessment, a test which poses a division of cases into hypothetical and non-hypothetical is not useful.

50. Secondly, this argument suggests that a fire or power failure or both would have to be in effect before the complainants could refuse to work. This ignores the fact that the purpose of a fire alarm is to sound an early warning to those within its range of a fire of which they might not otherwise be aware. Even where the possibility of a fire may be relatively remote, fire alarms are installed because the impact of a fire is often life-threatening, and its occurrence unpredictable. Where, as in a mine, the effect of a fire may be even more deadly because of limitations on the air supply and means of escape, that concern is compounded. To suggest that the complainants could not refuse to work until the moment of a fire or power failure involves a misapprehension with respect to the purposes of both the fire alarm system and the contingency plan. The complainants' concern was that by the time a fire had occurred, it might well be too late.

51. We now turn to whether the complainants were entitled to continue to refuse to work after being informed by Mr. Lecoupe that the Ministry of Labour approved the plan, and after Mr. Booker's telephone conversation with Mr. Djivre. The source of the increased onus following upon an inspector's report is described as follows in *Canadian Gypsum, supra*:

An employee who continues to refuse to work in the face of an investigation and a decision by a

neutral expert that these conditions do not exist must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protections of the Act.

[emphasis added]

52. Part of our difficulty in assessing the impact of Mr. Djivre's communications is that they do not fit neatly into the scheme of section 23 which appears to contemplate an investigation and a decision in writing by an inspector on the spot at the time of the refusal delivered directly to the parties (see sections 23(7), (8), (9), (10), (11) and (12)). We are also at somewhat of a disadvantage in considering the effect of the telephone conversation between Mr. Djivre and Mr. Booker because we have no evidence with respect to what Mr. Djivre said. However, to take the respondent's case at its highest, we are prepared to assume firstly that Mr. Lecoupe's indirect conveyance of Mr. Djivre's views should have the same impact as a direct statement by Mr. Djivre, and that secondly, Mr. Djivre told Mr. Booker that the Ministry of Labour had approved the respondent's contingency plan and that there was no basis for a work refusal. In the face of these assumptions, we still have considerable doubt as to whether the reasonableness of the complainants' position was called into question. We note firstly that the complainants had received, directly or indirectly, conflicting views from two different inspectors. In addition, both the opinions of Mr. Allen and Mr. Djivre were formed without consulting one of the parties and neither conducted an on-site investigation prior to forming their opinions, although both planned to attend at the workplace at some later point. While we do not doubt the general expertise of either Mr. Allen or Mr. Djivre, it is evident that the lack of an on-site investigation would have an impact on the deployment of that expertise with respect to the circumstances of this case. The evidence was that Mr. Allen was newly assigned to the plant and had not visited it before providing his opinion over the telephone. While Mr. Djivre may have been in the mine previously, it was apparent that he was sufficiently unfamiliar with it to ask Mr. Dickie to describe its basic layout on November 30th, 1987, the day following the refusals and Mr. Djivre's conversation with Mr. Booker.

53. The Board has observed previously that the onus will not increase where there has been no meaningful investigation (see *Auto Jobbers Warehouse Limited*, [1981] OLRB Rep. Dec. 1715). We note as well the respondent's earlier position that Mr. Djivre was not performing the formal functions of an inspector under section 23. We conclude that the circumstances described above militate against the effect the communication of Mr. Djivre's views either to Mr. Booker or by Mr. Lecoupe might otherwise have had. In our view, the conditions which might increase the onus upon the complainants have not been met.

54. Mr. Djivre's subsequent report is not particularly helpful in this regard. As noted earlier, it is not necessary that employees be proven correct in their views with respect to whether the workplace is unsafe, but only that they have reasonable grounds for their views in light of the knowledge they had or could reasonably be expected to have had at the time. (*Inco, supra*). In addition, it was delivered some five days after the work refusals, without an inspection and without ascertaining the concerns of employees. Even assuming, without finding, that it might shed some light on the reasonableness of the refusals, it is in any event somewhat ambiguous. One of its recommendations is that the back-up fire alarm system (the contingency plan) be tested and improved if found necessary. This suggests that there were some lingering doubt as to the efficacy of the plan. Moreover, the report concludes that "there did not appear to be a refusal to work condition as described under section 23 of the Act [sic]" which we understand to mean employees were not entitled to refuse to work. However, in his letter of December 6th, 1987 Mr. Djivre states as follows:

From our conversations, it was my understanding that you were going to provide radio communications to alert your workers of an emergency or fire when the power underground is off. The

details of your plan in my opinion should be resolved by the Joint Health & Safety Committee and/or the employer.

Assessment report no. 02964 further clarifies my position in this regard. Further to our conversations of Dec. 4, 1987, I understand that in the interim period workers will be advised to go to the refuge station in the event of a power outage.

55. This suggests both that the details of the plan had not yet been resolved, and that in the interim workers would be permitted to go to the refuge station when there is a power failure. This latter point is precisely the position taken by the complainants which lead to their work refusals. Thus, even if we were to accept that the report should play some role in assessing the reasonableness of the complainants' refusals, it suggests some support for their position. We also have some doubts as to the role an inspector's conclusions with respect to whether the work refusals meet the conditions of section 23 should play (as opposed to his views in regard to the safety of the workplace), given that that is the central question to be answered by the Board in this case. We conclude that the complainants were entitled to continue to refuse to work despite Mr. Djivre's telephone conversations, report, and other involvement.

56. The respondent also argued that the complainants' actions were taken as a result of ulterior motives, that is, to reinforce their rejection of the contingency plan at the JOHSC meeting, rather than out of a sincere concern for their own safety. We do not find these propositions mutually exclusive. The issue was raised at the JOHSC meeting at the respondent's initiative as a result of the prior work refusals. The employee representatives' rejection of the contingency plan at that meeting was for the same reasons which prompted the work refusals, that is, that they believed that the contingency plan was unsafe. There is no doubt that at least Mr. Casey and Mr. Chapman were frustrated by what they felt was the respondent's refusal to take their concerns seriously and by the decision to act unilaterally when the JOHSC could not reach agreement. At the same time it was also clear that the respondent perceived the dispute largely in terms of control of the workplace, rather than as a legitimate health and safety issue. In part, this dynamic stems from the juxtaposition of the joint responsibilities and obligations under the O.H.S.A. with a workplace structure characterized by a general requirement of obedience from employees. Under section 23, employees have the right to act in a manner which might otherwise be considered insubordination. In this regard, the Board made these comments in *General Motors of Canada Limited*, [1980] OLRB Rep. May 700:

We do not reach this conclusion lightly for the rights guaranteed by Bill 139 are critically important to all employees. The concept of insubordination is singularly inappropriate in situations where an employee is refusing to work in an honest (although mistaken) belief that his health or safety may be threatened. We accept the view, so accurately expressed by Doke, that in such matters one should err on the side of caution and prudence. An employee should not be penalized for doing so, nor should this Board be unduly concerned if *bona fide* concerns for employees' safety result in occasional disruptions of the employer's production process....

This tension between a joint responsibility scheme and the general workplace rule requiring an employee to obey first and grieve later is compounded by two other factors. First, work refusals are more commonly associated with the kind of economic pressure which is normally prohibited during the term of a collective agreement. Thus the use of that right in another context is likely to make management officials apprehensive and wary. Secondly, there are limitations on the role of the JOHSC which mean that it is not surprising that an impasse there may spill over into the activities contemplated by section 23. The events before us were undoubtedly coloured by these elements. This does not in itself suggest to us that the complainants' work refusals were less than *bona fide*, or that they did not meet the requirements of section 23. Rather, it confirms the difficulty of isolating events from the legal and social context of the workplace.

57. These structural dynamics which may complicate genuine health and safety concerns must be distinguished from a case where a complainant is not motivated by health and safety concerns at all. For example, *Cooper Company Limited*, [1981] OLRB Rep. Aug. 1113 provides some contrast to the case before us. There the Board, while noting that it should be slow to conclude that complainants are not sincerely motivated in health and safety matters, found that it was satisfied that the complainant was motivated by a desire to disrupt the respondent's job project rather than health and safety considerations:

22. In light of the importance of health and safety matters, one should be extremely reluctant to conclude that an employee who claims to have been acting out of health and safety concerns was in fact motivated by other considerations. Any serious doubts about the truth of the matter should be resolved in favour of the employee. In the instant case, however, we are fully satisfied that Mr. Varty's conduct was not motivated by any health and safety considerations but rather by a desire to continue to disrupt the respondent's job project, and that the method he chose to do so was by raising a false health and safety issue.

In this case, the existence of accompanying dynamics does not negate the complainants' original concerns.

58. The respondent also argued that it may not be economically viable for an employer to make the workplace safer. Even if we were to accept the dubious proposition that employees' health or safety can be legitimately endangered for economic reasons, in our view this is beyond the scope of the Board's inquiry. Our task in this case is to determine whether the complainants were disciplined or suspended because they acted in compliance with the Act or sought its enforcement. This also requires us to determine whether they had reasonable grounds for this work refusal under section 23(6). While our conclusions in this regard may have some implications for the safety of this workplace, it is neither necessary nor advisable for us to embark upon a more general consideration of the merits of the parties' respective positions on safety requirements (see *Commonwealth Construction Company*, [1987] OLRB Rep. July 961).

59. Similarly, we recognize that occupations differ with respect to risks to employees and that even at its best, a mine may be less safe than other workplaces. At the same time we reject the notion that by working in such a workplace an employee cannot later be heard to complain of danger. This proposition, which appears to be related to either the maxim "volenti non fit injuria" ("he who consents cannot receive an injury") or to a form of estoppel, is not applicable to these circumstances. Regardless of the inherent risks of their occupations, employees are entitled to insist that their workplace be made as safe as is reasonably possible, and to resort to work refusals when the conditions of section 23 have been met. To hold otherwise would be contrary to the remedial purposes of the O.H.S.A., and would raise a number of probably unanswerable questions with respect to the choice of jobs available to employees and so forth.

60. In the same vein, it was apparent that some of the complainants' concerns, particularly those of Mr. Murphy, had existed for some time prior to November 29th. While this might be a fact which affects credibility in other circumstances, here the discovery that the fire alarm did not function during a power failure appeared to be in the nature of a last straw for the complainants. We are of the view that employees who have lived with one degree of risk are entitled to refuse a higher degree or to insist that that risk be minimized, providing, of course, that any refusal to work in this regard otherwise fits within section 23. Indeed, it might well be that in a workplace which is less safe to begin with, lesser circumstances might provide reasonable grounds for a work refusal because the margin of safety is already so slim.

61. The respondent also argued that the plan which prompted the work refusals was not a piece of equipment, a machine, a device or a thing within the meaning of sections 23(4)(a) and

23(6)(a), nor the physical condition of the workplace as set out in sections 23(4)(b) and 23(6)(b). (It was not argued by the complainants that the respondent was in violation of the mining regulations with reference to sections 23(4)(c) and 23(6)(c).) However, the Board has given a broad interpretation to the word “workplace” in section 23. In *Firestone Canada Inc.*, [1985] OLRB Rep. July 1044 the Board found that the motion of throwing tread on a platform was included within the definition of “workplace” and that a worker was exercising his rights under section 23 in refusing to perform the motion. In this context, we conclude that the complainants’ concerns with respect to the contingency plan related to the physical condition of the workplace inasmuch as they involved the effect of a fire on the safe egress or refuge of employees, the safety of the air supply, and so forth.

62. Counsel for the respondent also argued that his client had no “anti-safety animus”. Whatever that phrase may mean, we do not think it is an element required by section 24. The complainants were disciplined by the respondent because of their work refusals, refusals which we have found to be in compliance with the O.H.S.A. In *Firestone, supra*, the Board noted that a more specific intention on the part of an employer is unnecessary:

19. This brings us to the most perplexing part of the present case. On the one hand, we are prepared to find that Mr. Lunn had reason to believe that the work was unsafe. However, we are also of the view that the employer did not have intent to discipline Mr. Lunn because Mr. Lunn was exercising a right under the Act. Rather, the respondent was applying its regular policy with respect to employees assigned to perform a certain task. That there was no such specific intention by the employer to discriminate against Mr. Lunn is not a defence under section 24 of the Act *once it is found that the employee was acting within the scope of his rights under the Act*. The employer understood what Mr. Lunn was saying and chose not to believe him. Although the employer refused in good faith to believe Mr. Lunn’s concern, the net result was that Mr. Lunn was deprived of two days employment because he exercised a right under the Act.

[original emphasis]

At the same time we reject the complainants’ contention that the respondent did not consider the safety of employees at all in the development of the contingency plan. While safety was not a factor enumerated by Mr. Frost in explaining how the plan was developed, the respondent’s concern for safety was implied by the very existence of the plan.

63. Although both parties made arguments in this regard, we do not think that the fact that most employees originally refused to work or that the three complainants were the only employees to continue to refuse to work after the threat of discipline is particularly telling, one way or another. Employees may have many individual reasons for refusing or not refusing to work, and the variation in those reasons will be amplified by the introduction of another element such as the threat of discipline.

64. For all these reasons, the majority of the Board concluded that the respondent had violated section 24 of the O.H.S.A. and delivered an oral decision to this effect at the end of the hearings in this matter, with reasons and remedy to follow.

65. Turning to the question of remedy, the respondent also argued that the complainants had not been disciplined but merely sent home on November 29, 1988. The disciplinary letters they received cited suspensions for periods subsequent to November 29th. As a result, the respondent argued that they should not be compensated for their losses on November 29th. We do not agree. The complainants were sent home because of their work refusals. The effect was to deprive them of earnings they would otherwise have received. There was no suggestion the respondent had attempted to find other work for them without success. On the evidence before us, it is clear that the respondent’s actions in sending the complainants home on November 29th were intended in

part to penalize them for their work refusals which the respondent viewed as frivolous and insubordinate.

66. We therefore direct that the respondent compensate the complainants for all losses suffered as a result of the work refusals, together with interest in accordance with the Board's Practice Note No. 13.

67. We have not addressed the respondent's threat of discipline to the other employees who initially refused to work as that was not the subject of any of these complaints.

DECISION OF BOARD MEMBER D.G. WOZNIAK; August 5, 1988

1. I dissent, in part, from the majority decision.

2. The facts as stated in the majority decision are essentially correct and therefore it is not necessary to repeat them. However, it is with the interpretation of the facts and events that I differ from the majority.

3. I have no difficulty with the majority decision up to the point where they consider the evidence and rule on the tests required under sections 23(3) and (6) of the Occupational Health and Safety Act. In my opinion, after a careful review of the evidence and considering in particular the testimony of the complainants I came to the opposite conclusion. The testimony of the complainants that they had "reason to believe" or "reasonable cause to believe" that conditions in the mine would endanger them was flat and unconvincing. A simple statement by an individual that he was afraid unsupported by any other indications is not sufficient to indicate a genuine fear. One complainant did embellish his concern by referring to a newspaper report on a similar incident where several miners perish in a mine fire but he was vague about the circumstances and was unable to state when or where the incident occurred.

4. Accordingly, for these reasons, I would dismiss the complaints.

3434-87-R Michael Van Landeghem, Tracy Van Landeghem and Terry Manzutti, Applicants v. The Labourers' International Union of North America, Ontario Provincial District Council, and its affiliated Local Union Labourers' International Union of North America, Local 1036, Respondent v. 657572 Ontario Inc. c.o.b. as Double S Construction, Intervener

Parties - Practice and Procedure - Termination - Termination application referring to District Council and one local - Province-wide agreement naming District Council and all affiliated union locals as parties - International, District Council and all affiliated union locals necessary parties - Applicant allowed to amend title of application to include all those local unions named in the collective agreement as respondents

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *J. Rossi* and *M. Van Landeghem* for the applicants; *L. A. Richmond*, *J. Lewis* and *T. Connolly* for the respondents and for Labourers' International Union of North America,

Locals 183, 247, 491, 493, 527, 597, 607, 625, 837, 1059, 1081 and 1089; *Richard J. Nixon* and *John Smale* for the intervenor.

DECISION OF THE BOARD; August 19, 1988

1. This is an application, under section 57 of the *Labour Relations Act*, for a declaration that the respondents no longer represent the employees of 657572 Ontario Inc. c.o.b. as Double S Construction ("Double S") for whom they have heretofore held bargaining rights. It came on for hearing on July 11, 1988 and, upon motion for the respondents, was dismissed by a unanimous decision of the panel for oral reasons given at the hearing. For reasons which follow, the Board finds it appropriate to reconsider its decision to dismiss the application.

2. The respondents submitted that the bargaining unit to which this application relates is described in the collective agreement (the "Utility Agreement"), effective May 12, 1986 to April 30, 1988, which is styled as being between:

The Utility Contractors' Association of Ontario Incorporated, on behalf of its member companies engaged in power, energy and communication construction, maintenance and similar work throughout the Province of Ontario.

(hereinafter referred to as the "Association")

OF THE FIRST PART:

- AND -

The Labourers' International Union of North America, Ontario Provincial District Council, and its affiliated Local Unions, Labourers' International Union of North America, Local 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, each of which, Council and Local Unions, are parties to this Agreement.

(hereinafter referred to as the "Union")

OF THE SECOND PART: [sic]

The respondents assert that the bargaining unit should be described in terms of all construction labourers employed by Double S in other than the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. The respondents further submitted that, although the individual locals of the Labourers' International Union of North America are responsible for the territorial administration of the collective agreement, it is a province-wide collective agreement and that the necessary respondents are the Labourers' International Union of North America, Ontario Provincial District Council ("District Council") and all of its affiliated local unions named in the collective agreement. The respondents submitted that because this application seeks to terminate only the bargaining rights of the District Council and Labourers' International Union of North America, Local 1036 ("Local 1036"), and the petition (or statement of desire as it is otherwise commonly referred to) filed in support of the application unambiguously refers to only those two entities, the application is improper and must be dismissed.

3. The applicants agreed that the bargaining unit should be described in accordance with the collective agreement, but submitted that, for purposes of this application, it should be described in terms of the construction labourers employed by Double S in other than the ICI sector of the construction industry in the District of Algoma, save and except non-working foremen and persons above that rank. The applicants also adopted the argument of Double S to the effect that

the collective agreement is structured so that the local unions are proper but not necessary parties to this application because the District Council is the representative and agent for each of the named local unions, and that notice to the District Council was therefore notice to the local unions for all purposes. The applicants and Double S both submitted that, because all of the local unions had in fact been given notice of the proceeding, there was no prejudice to them and no reason to dismiss the application. Both also argued that the petition filed in support of the application unambiguously refers to a desire to terminate the bargaining rights of all of the local unions as well of the District Council. However, when questioned by the Board, the applicants and Double S both stated that any declaration that issued should refer to all local unions as well as the District Council, and further agreed that it followed that they should, for purposes of clarity at least, all be named as respondents in the title of the proceeding as well. In the alternative, the applicants, supported by Double S, urged the Board to reject what they characterized as the respondents' overly technical argument and to amend, pursuant to section 104 of the Act, the title of the proceeding to include the District Council and all of the local unions named in the collective agreement.

4. By agreement in writing dated December 21, 1987, Double S, the respondents herein, and a group of employees represented by one of the applicants herein (Michael Van Landeghem) agreed to settle the matters in dispute between them in Board File Nos. 1300-87-R and 1301-87-G. Paragraph 3 of the agreement provides that:

Double S hereby acknowledges that is [sic] bound by and party to the collective agreement between the Utility Contractors Association of Ontario Incorporated and Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions Labourers' International Union of North America, Local 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, each of which, Council and Local Unions are parties to the agreement, which agreement is effective from May 12, 1986 to April 30, 1988 ("the Collective Agreement"). Double S acknowledges that it is bound to the Collective Agreement as if it were an original party thereto and as if it were a member of the Utility Contractors Association of Ontario Incorporated. Double S acknowledges that it is familiar with all the terms and conditions of the Collective Agreement. Double S acknowledges that it became bound by the collective agreement effective April 29, 1987.

It is evident that Double S voluntarily agreed to be bound to the Utility Agreement and thereby recognized the District Council and all of its named local unions as the bargaining agent for its employees in the bargaining unit described therein. Consequently, Double S and the applicant Michael Van Landeghem knew that the District Council and each of its named locals held bargaining rights for Double S. Subsequently, the Board, differently constituted, issued a decision (dated April 11, 1988) with respect to those matters which, among other things, declared that:

657572 Ontario Inc. c.o.b. as Double S Construction, effective April 29, 1987, is bound by the collective agreement between the Utility Contractors Association of Ontario Incorporated and Labourers' International Union of North America, Ontario Provincial District Council and its affiliated local unions, which agreement is effective from May 12, 1986 to April 30, 1988.

5. The collective agreement which was referred to in the agreement between the parties and the Board decision in Board File Nos. 1300-87-R and 1301-87-G, and which the parties agreed was in the last two months of its operation when this application was made, is the Utility Agreement referred to in paragraph 2 above. The relevant parts of Article 2 of that agreement, which has since expired, provide:

ARTICLE 2 - RECOGNITION

2.01 The Association on behalf of its member companies, recognizes the Labourers' International Union of North America, Ontario Provincial District Council, and its Affiliated Local Unions, 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, who are parties

to this Agreement as the sole and exclusive Bargaining Agent for all construction labourers employed by its member companies in the Province of Ontario, save and except Non-working Foremen and persons above the rank of Non-working Foremen.

2.02 Each of the Local Unions listed in Section 2.01 above, agrees with all others, with the Council and with the Association:

- (a) to maintain the Council as their representative and agent for the purpose of bargaining collectively and concluding a Collective Agreement with the Association in accordance with the Uniform District Council Constitution; and
- (b) to delegate, and they do hereby delegate, to the Council acting as their representative and agent, their authority as aforesaid for members of their respective Local Unions who come within the scope of this Agreement and agree to not withdraw such authority nor to seek to bargain individually with the Association or its members.

This agreement had expired and Double S, which is not a member of the Utility Contractors Association of Ontario Incorporated, was not bound, at the time of the hearing, to a collective agreement with any of the District Council or its affiliated local unions named in the Utility Agreement.

6. By decision dated May 11, 1988 in this application, the Board differently constituted, adjourned the hearings so that notice of the proceeding could be given to the Utility Contractors Association of Ontario Incorporated and to Locals 183, 247, 491, 493, 527, 597, 607, 625, 837, 1059, 1081, and 1089 of the Labourers' International Union of North America. These entities were given notice in the following form:

Dear Sirs: Michael VanLandeghem, Tracy VanLandeghem and Terry Manzutti, and Labourers', Ontario Provincial District Council, and its affiliated Local Union Labourers' 1036 (657572 Ontario Inc. c.o.b. as Double S Construction -- District of Algoma and Province of Ontario)

I am enclosing herewith the following documents:

- (a) Form 18 (Notice of Application for Declaration Terminating Bargaining Rights and of Hearing) and a copy of Form 17 (Application for Declaration Terminating Bargaining Rights), and
- (b) Form 20 (Reply to Application for Declaration Terminating Bargaining Rights), in blank.

Please read these documents carefully. Copies of The Labour Relations Act and of the Board's Rules of Procedure are available upon request.

You will note that the Board will commence its hearing of this case in its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario, M7A 1V4, at 9:30 a.m. (EDT) on Monday, July 11, 1988.

7. In their Reply, filed on June 23, 1988, subsequent to the release of the Board's May 11, 1988 decision in this matter, the respondents asserted that the correct name of the respondents should be "Labourers' International Union of North America, Ontario Provincial District Council and its affiliated local unions, Labourers' International Union of North America, Local 183, 247, 491, 493, 527, 597, 607, 837, 1036, 1059, 1081 and 1089".

8. The applicants have named only the District Council and Local 1036 as respondents. The application makes no reference to any of the other local unions of the Labourers' Interna-

tional Union of North America named in the Utility Agreement. The petition, which contains three signatures, filed in support of the application states:

IN THE MATTER of The Labourers' International Union of North America Ontario Provincial Council, and its affiliated Local Union Labourers' International Union of North America, Local 1036.

AND IN THE MATTER of the employer, 657572 Ontario Inc. c.o.b. as Double S Construction

AND IN THE MATTER of the Ontario Labour Relations Act, R.S.O. 1980,

AND IN THE MATTER of an Application to Terminate the Union's Bargaining Rights with respect to the employer Double S Construction

P E T I T I O N

We the undersigned employees of Double S Construction do hereby petition the Ontario Labour Relations Board and apply to terminate the bargaining rights of The Labourers' International Union of North America, Ontario Provincial District Council, and its affiliated Local Union Labourers' International Union of North America, Local 1036. We no longer wish to be represented by this Union and our signatures below, reflecting this desire, represents more than 45 per cent of the employees bargaining unit.

9. Nowhere on the face of any of the application, petition, the various notices with respect to the application (including those sent pursuant to the Board's May 11, 1988 decision), or any other document, is there an express indication that the applicants are seeking to terminate the bargaining rights of any one other than the named respondents; that is, the District Council and Local 1036. Nor did the applicants seek to amend their application prior to the hearing on July 11, 1988.

10. Section 57(2)(a), 57(3) and 57(4) of the Act are applicable to this application and provide that:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

In an application under section 57, the Board must determine whether the employees in the bargaining unit, as defined by the applicable collective agreement, desire that the right of "the trade union" to represent them be terminated. Before the Board can direct the taking of a representation vote in which the employees can express their wishes in this respect, the Board must be satisfied that at least forty-five per cent of them have "voluntarily signified in writing", in the form of a petition, that they no longer wish to be represented by the trade union. Section 57(3) and sec-

tion 57(1) of the Board's Rules of Procedure operate together to preclude the Board from receiving evidence of the employees' wishes other than in writing, in the form of a petition filed by the terminal date fixed for the application. Accordingly, although the Board, having regard to the nature of petitions, is concerned with the substance rather than the form of such documents, and therefore construes them liberally, it must be satisfied that the wording and form of the document are such that its intent and purpose are unequivocal (see for example, *Irwin Toy Limited*, [1983] OLRB Rep. Apr. 536); that is, that, if proved voluntarily, it indicates that the employee signing it no longer wish to be represented by "the trade union".

11. Sections 104 and 114 of the Act provide that:

104. Where in any proceedings before the Board the Board is satisfied that a *bona fide* mistake has been made with the result that the proper person or trade union has not been named as a part or has been incorrectly named, the Board may order the proper person or trade union to be substituted or added as a party to the proceedings or to be correctly named upon such terms as appear to the Board to be just.

114. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

They operate together to ensure that errors of form or technical deficiencies do not stand in the way of the adjudication of the real matters in dispute in proceedings before the Board.

12. It was our view that the bargaining unit to which this application applies, as defined by the Utility Agreement, is all construction labourers employed by Double S in the Province of Ontario, excluding the ICI sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

13. We were also satisfied that each of the District Council and the local unions of the Labourers' International Union of North America named in the title in Article 2 of the Utility Agreement are parties to it and, further, that Article 2.02, at most, constitutes a delegation of authority to bargain (as opposed to bargaining rights) by the local unions to the District Council. This delegation, which is analogous to the bargaining authority vested in an employee bargaining agency with respect to province-wide bargaining in the ICI sector by section 142 of the Act, does not constitute the District Council as the agent for the locals for the purposes of termination proceedings which affect bargaining rights and are not part of the bargaining process. In that respect we preferred the reasoning articulated in *Clarence H. Graham Construction Limited*, [1982] OLRB Rep. Aug. 1147 (at paragraph 15) to that in *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. July 1011 (at paragraph 10).

14. We concluded that, not only did Locals 183, 247, 491, 493, 527, 597, 607, 625, 837, 1059, 1081, and 1089 of the Labourers' International Union of North America not receive actual notice that their bargaining rights could be affected by this application, but, in the circumstances, notice to the District Council (or to Local 1036) did not constitute constructive notice thereof. Further, as was implicitly accepted by the applicants and Double S, a declaration terminating the bargaining rights of the District Council or Local 1036 would not terminate the bargaining rights of the other locals (and might not even effectively terminate those of the District Council or Local 1036; see *Jan Peters Ltd.*, [1980] OLRB Rep. May 714 at paragraph 4).

15. For purposes of this application, "the trade union", as used in section 57 of the Act, means the District Council and all of the local unions of the Labourers' International Union of North America named in the Utility Agreement, and that, consequently, all are necessary parties

(as respondents) to this application. The Act does not contemplate the possibility of terminating representation rights of anything less than the entire "trade union" or for anything less than the entire bargaining unit.

16. In the result, we concluded that the locals other than Local 1036 had not been given sufficient notice that the applicants sought to terminate their bargaining rights as well as those of the District Council and Local 1036. Further we were persuaded that the omission or deficiency in the application was one of substance and not one of mere form and that, in the circumstances, it was not appropriate to grant the amendment requested at the hearing either *nunc pro tunc* pursuant to section 104 or otherwise. Accordingly, the application was dismissed, but without prejudice or bar to the bringing of a new application.

17. Upon further reflection, however, we find that, although the Board's conclusions with respect to the description of the bargaining unit affected by, and the respondents necessary to, this application were correct, the Board erred in refusing to amend the title of the application, albeit with an adjournment, to include all those local unions named in the Utility Agreement as respondents. In that respect we observe that:

- (a) *all* of the unions named in the Utility Agreement did receive actual notice of the application and of the hearing which took place on July 11, 1988;
- (b) all of the unions named in the Utility Agreement were represented at the hearing on July 11, 1988;
- (c) the reply, which itself asserts that all of the unions named in the Utility Agreement are necessary respondents and suggests that there should have been no surprise that an amendment was sought, was obviously filed in response to the Board's decision of May 11, 1988 which, on a fair reading, suggests, implicitly if not expressly, that the bargaining rights of all the unions named in the Utility Agreement are affected by this application (which was the reason for giving them all notice);
- (d) having regard to the exigencies of the delivery of mail in this Province, it was not unreasonable for the applicants to seek, albeit in the alternative, the amendment at the July 11, 1988 hearing;
- (e) there would be no prejudice, arising out of any inadequacy of the notice they received, to any of the unions named in the Utility Agreement if the amendment had been granted that could not have been cured by an adjournment;
- (f) it was overly technical, inconsistent with the intent of the Act, and not in the interests of fairness and justice to deny the amendment.

18. Accordingly, pursuant to the Board's powers under section 106(1) of the Act, the Board hereby reconsiders its oral decision at the hearing of July 11, 1988 by revoking that decision insofar as it dismissed the application and the applicants' request for an amendment to the title of the application. Instead, the Board now finds it appropriate to grant that request and, accordingly, the title of this application is amended, *nunc pro tunc* by adding Locals 183, 247, 491, 493, 527,

597, 607, 625, 837, 1059, 1081 and 1089 of the Labourers' International Union of North America as respondents.

19. The Registrar is directed to schedule this application for hearing on the merits in consultation with the parties. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application. In the circumstances, the hearing should be held in Sault Ste. Marie if any party so requests.

20. This panel is not seized.

0823-88-R International Brotherhood of Painters and Allied Trades Local 1891, Applicant v. Image Painters L.M. Inc., Respondent

Certification - Construction Industry - Practice and Procedure - Respondent employer requesting a hearing on basis that some employees not understanding the nature of the certification process as a result of their inability to understand English - Board not allowing employer to speak for employees absent allegations of fraud or intimidation - Certificates issuing without a hearing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

DECISION OF THE BOARD; August 11, 1988

1. The name of the respondent is amended to read: "Image Painters L.M. Inc.".

2. This is an application for certification made under the construction industry provisions of the *Labour Relations Act*. Subsection 102(14) of the Act gives the Board the discretion to dispose of applications for certification in the construction industry without the need to hold a hearing. The reply filed by the respondent has been completed so as to request a hearing of the application by the Board. The respondent's reasons for requesting a hearing are set out in the reply as follows:

The Respondent is requesting a hearing by the board due to the fact that 50% of the employees do not speak or understand english [sic] and can not work nor communicate selfsufficiently without a translator.

It is also our opinion that the following employees do not understand the purpose and nature of certification.

(five persons named)

3. The Board understands the respondent to be requesting a hearing because five employees affected by the application do not understand the purpose and nature of the certification process as a result of their inability to understand the English language. If the Board's understanding is correct, whether or not it was the respondent's intention to do so, its request amounts to a plea on behalf of its employees. As a general rule, the Board does not permit an employer to speak for employees in an application for certification absent allegations of fraud, intimidation or coercion in the obtaining of membership evidence. See *Federated Building Maintenance Company Limited*, [1979] OLRB Rep. Oct. 974, at para. 9. Even were the Board to take the respondent's allegations as inferring that the employees have not had proper notice of this application because the Board's

notices to employees were in the English language which they are incapable of understanding without the assistance of a translator, that is a matter for the employees to raise. While it might be argued that the employees could not know to raise the matter if they do not understand the language of the notice, that has not been the Board's experience. In *Federated Building*, *supra*, the respondent employer had alleged that, for the Board to process the application for certification, would be to deny the employer's employees natural justice because they had not received proper notice of the application. The allegation was founded on the acknowledged fact that eighty per cent of the employees affected by the application could not read English and the Board's notices of the application had been posted in the English language only. The Board concluded that the employer had no standing to make that plea on behalf of its employees and, in so doing, commented as follows:

13. Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or with public administrative tribunals. Immigrant Canadians generally obtain, and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal. In this case, all 125 of the employees were able to respond to the Board's subpoena, written in English, issued to them by the employer. In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under *The Labour Relations Act*. (*IlSCO of Canada Ltd.*, [1973] OLRB Rep. May 221; *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 688; *Dylex Ltd.*, [1977] OLRB Rep. June 357.)

4. In the instant case, therefore, having regard to all of the foregoing, even were the Board to accept as true everything which the respondent has said in support of its request for a hearing, the respondent's allegations do not raise grounds which would cause the Board to hold a hearing into this application.

5. In this application for certification the applicant filed eight combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

6. The respondent filed a reply, a list of employees containing ten names on Schedule "A" and one name on Schedule "B" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

7. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades.

8. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

9. The Board further finds, pursuant to section 144(1) of the Act, that all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 15, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 7 above in respect of all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

12. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0764-88-M Knob Hill Farms Limited, Employer v. United Food and Commercial Workers Local 175, Trade Union v. Group of Employees, Intervener

Collective Agreement - Conciliation - Parties - Reference - Union Successor Status - Local 206 certified by Board - Local 175 requesting a conciliation officer - Whether Minister having authority to appoint a conciliation officer - Purported merger occurring before Local 206 certified - Board not having authority to declare Local 175 a successor - Minister not having authority to appoint a conciliation officer at the request of Local 175

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. N. Fraser* and *K. S. Davies*.

APPEARANCES: *Michael Gordon*, *Paul G. Normandeau* and *Howard F. Wood* for the employer; *A. J. Ahee* and *J. McMahon* for the trade union; *D. H. Brown* and *D. Baydek* for the intervener.

DECISION OF THE BOARD; August 18, 1988

1. On December 22, 1987, another panel of this Board ("the certification panel") certified "The United Food & Commercial Workers Union, Local 206" ("Local 206") pursuant to section 8 of the *Labour Relations Act* ("the Act") as the exclusive bargaining agent for a unit of employees of the Employer in Oshawa, Ontario. On January 15, 1988, a notice to bargain was sent to the Employer in the name of Local 206. By application dated April 26, 1988, the United Food and Commercial Workers International Union, Local 175, ("Local 175") requested that the Minister appoint a conciliation officer pursuant to section 16 of the Act.

2. One of the Employer's responses to that application was that the Minister could not act on the request of Local 175 because Local 175 did not have bargaining rights with respect to the subject employees. Local 175 responded that "effective November 1, 1986 U.F.C.W. Local 206 merged with U.F.C. Local 175." The Minister concluded that a question had been raised as to his authority to appoint a conciliation officer in the circumstances of this request. Pursuant to section 107 of the Act, he has referred the following question to the Board for its advice: Does the Act authorize the Minister to appoint a conciliation officer pursuant to the request from Local 175 in the circumstances of this case?

3. The Reference came on for hearing before a different panel of this Board on July 14, 1988. That panel's decision records that counsel for Local 175 then advised it that he would be asking the Board to "make a declaration in the nature of a section 62 declaration that a merger had occurred between the two locals." The majority then ruled that Local 175 should deliver particulars of this claim by July 21, 1988 and that notice of it should be given to affected employees. It adjourned the Board's hearing to a date to be fixed by the Registrar in the week of August 15, 1988. Particulars were filed. Notices to employees were posted, the sufficiency of which is questioned by the Employer and by the employees who have intervened to oppose the request for a declaration that Local 175 is successor to Local 206. The reference came on for hearing before this panel on August 17, 1988.

4. Subsection 62(1) of the Act provides that

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union *that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer* and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the suc-

cessor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

[emphasis added]

In paragraph 15 of the particulars it filed following the hearing of July 14, 1988, Local 175 asserted that, at the time of the alleged merger between Local 175 and Local 206,

Local Union 206 did *not* have bargaining rights for the bargaining unit of employees of the Employer Knob Hill Farms Limited, and therefore the condition precedent for an application under Section 62 of the Ontario Labour Relations Act does *not* obtain.

[emphasis added]

In paragraph 16 of its particulars, Local 175 states that it seeks

a declaration by the Board, pursuant to its powers and authority under section 107(2) of the Ontario Labour Relations Act, that Local Union 175 is the successor to Local Union 206

in this proceeding.

5. In answer to our questions, counsel for Local 175 confirmed that the negatives in paragraph 15 of the particulars were intentional and stated that the “time of” the alleged merger was November 1, 1986, more than a year before the decision granting Local 206 certification with respect to the subject unit of employees. When asked to identify the time when Local 175 said that the alleged merger had actually occurred, rather than an effective date as of which the trade union participants may have agreed to “back date” the merger once all conditions precedent to the merger had been fulfilled, counsel again said that date was November 1, 1986. Counsel for Local 175 conceded that if, as it asserted, “the condition precedent for an application under section 62 of the Labour Relations Act does not obtain” then, equally, the condition precedent to a declaration under section 62 does not obtain. He said that his client’s claim (in paragraph 16 of its particulars) to a declaration that Local 175 is the successor to Local 206 depended on the proposition that the Board’s jurisdiction to so declare is broader under subsection 107(2) than it is under subsection 62(1). He agreed that if this proposition is incorrect we could not declare Local 175 to be successor to Local 206 in the circumstances of this case. All counsel then agreed that we should hear argument with respect to the correctness of this proposition before dealing with the adequacy of notice to employees or hearing any evidence with respect to the purported merger. Having heard and considered that argument, we conclude that counsel’s proposition is not correct.

6. Subsection 16(1) and section 107 of the Act provide:

16.-(1) Where notice has been given under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

107.-(1) Where a request is made under section 1, subsection 44(4) or subsection 45(1), the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

(2) Where a question referred under subsection (1) involves an issue as to whether one trade union is the successor of another trade union or whether a business has been sold by one employer to another or where such question involves an issue under subsection 63(11), *the Board has the same powers and authority as it has under section 62 or 63, as the case may be, as*

if an application had been made thereunder, and the Board may issue such directions as to the conduct of the proceedings as it considers advisable.

[emphasis added]

In our view, the emphasized words are a complete answer to the proposition that the Board can under that subsection resolve an issue as to whether one trade union is the successor of another trade union by making a declaration which could not have been made if the issue had arisen in an application under section 62. If the Board has the *same* powers and authority as it would if an application had been made under section 62, then it must follow that it does not have broader or different powers or authority. Counsel for Local 175 asserts that, on its own view of the facts, we would not have the power on an application under section 62 to declare Local 175 successor to the statutory rights and obligations of Local 206 with respect to the subject bargaining unit. That assertion compels us to conclude that we do not have that power in these proceedings.

7. During the course of his argument, counsel for Local 175 made a series of inconsistent and ultimately equivocal statements about whether Local 206 continues to exist or not. Counsel for the employer expressed the belief that there would be other unspecified proceedings between the Employer and some entity purporting to have the right to represent its employees. He suggested that the question whether Local 206 had ceased to exist might have to be answered in those proceedings. Given the way the issues before us have developed, we do not have to answer that question in this proceeding. Furthermore, the conclusions expressed in this decision do not depend on any particular view of the possible outcome of, for example, an application to the certification panel by either the Employer or Local 175 requesting reconsideration of the certification decision.

8. The collective agreement referred to in subsection 16(1) of the Act is a collective agreement which would cover a particular bargaining unit of employees; the word “parties” in that subsection means the employer of those employees and the trade union which has the right under the Act to act as their exclusive bargaining agent. The Board’s decision of December 22, 1987 certified Local 206 to be the exclusive bargaining agent of the unit of employees with which the application for conciliation services is concerned. We are not asked to reconsider that decision. Local 175 does not claim to be one and the same trade union entity as was certified in that decision. Since we cannot declare Local 175 to be successor to Local 206’s statutory right to serve as exclusive bargaining agent in the face of the assertions and concessions of its counsel, we must conclude that Local 175 is not a party within the meaning of section 16.

9. Section 16 does not give the Minister authority to appoint a conciliation officer at the request of anyone other than a “party.” Having concluded that Local 175 is not a “party”, it is our respectful advice to the Minister that the Act does not authorize the Minister to appoint a conciliation officer at the request of Local 175 in the circumstances of this case.

0289-87-R Bricklayers, Masons Independent Union of Canada, Local 1, Applicant v. Masonry Contractors' Association of Toronto Inc., **Krest Masonry Contracting Limited** and 654812 Ontario Limited, carrying on business as Canada Contracting, Respondents

Construction Industry - Related Employer - Spouses of directors of one company putting up seed money for incorporation of non-union company doing same work - Board declaring companies to be one employer - Declaration retrospective only to application date

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Nelson Roland*, *Robin MacLean*, *John Meiorin* and *Otello Ongaro* for the applicant; *Joe De Caria* for the respondent Masonry Contractors' Association of Toronto; *James G. Knight* and *William Jahn* for the respondent Krest Masonry Contracting Limited; *Rudy A. Bianchi* for the respondent 654812 Ontario Limited carrying on business as Canada Contracting.

DECISION OF THE BOARD; August 3, 1988

I

1. The name of one of the respondents is amended to read "654812 Ontario Limited carrying on business as Canada Contracting".

2. This is an application under sections 1(4) and 63 of the *Labour Relations Act*. The relevant portions of those sections read as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

The union contends that pursuant to section 1(4), Krest Masonry Contracting Limited ("Krest") and 654812 Ontario Limited, carrying on business as Canada Contracting ("Canada Contracting")

should be treated as one employer for the purposes of the Act. Alternatively, the union contends that there has been a sale of "part" of Krest's business to Canada Contracting. The union argues that, in either case, Canada Contracting is bound by the collective agreement which binds Krest.

3. The respondents assert that there has been no "sale" of any part of Krest's business to Canada Contracting, nor are the two companies engaged in related activities or businesses under common control or direction. The respondents further assert that even if the prerequisites for a section 1(4) declaration are met, the Board should exercise its discretion not to make such declaration.

4. The hearings in this matter consumed a number of days, and it is neither practical nor necessary to review the totality of the oral and documentary evidence presented to the Board. To the extent that there was a dispute about the facts, we have weighed the evidence taking into account such factors as the demeanour of the witnesses when giving their evidence, the firmness of their recollections, the clarity, consistency, and general plausibility of their testimony when subjected to the test of cross-examination and considered in light of the other evidence presented to the Board, and what seems most probable in all the circumstances.

II

5. Krest is a masonry contractor that has been in business in the Metropolitan Toronto area for many years. William Jahn is the President of Krest as well as a director and major shareholder. The other shareholders and directors of Krest are: Christian Krille, Frank Galati, William Reimer and Doris Kosch, William Jahn's daughter. Until April 1986, Paul DeRose was a director of Krest, and remains a minority shareholder. Mr. DeRose is also a minority shareholder, officer and director of Canada Contracting.

6. Doris Kosch, Mr. Jahn's daughter, has been Krest's office manager for some 18 years. In that capacity she performs a variety of functions which occasionally require her to visit the company's construction sites. She is not engaged directly in construction work or site supervision; but by virtue of her position and experience she is quite knowledgeable about the masonry contracting business.

7. Krest's business involves bricking houses on new residential subdivisions. Krest's principal customer is a residential builder named Lorne Liebel, who runs a firm called Canada Homes. Mr. Liebel and Mr. Jahn have a long-standing commercial and personal relationship. According to Mr. Jahn, virtually all of their business is conducted with a "shake of the hand" and without regard to formal contractual documents.

8. From its inception, Krest has been a unionized business. Krest is bound by a collective agreement with the applicant union through its membership in the Masonry Contractors' Association of Toronto ("MCAT"). That collective agreement obliges Krest to employ only members of the trade union, and prohibits the subcontracting of work to any employer which does not itself have a collective agreement with the union. Such union security and work protection clauses are quite common in construction industry collective agreements.

9. At the time of the hearings, Krest had a direct work force of about 110 employees. In addition, Krest regularly engages approximately 10 subcontractors each of which, in turn, employs from 10 to 15 workers. Krest is a substantial business enterprise with annual revenues of approximately \$12 million. In recent years Krest has grown slowly but steadily. Krest is a prominent member of MCAT. For a time, Bill Jahn was the president of MCAT.

10. Until the spring of 1986 when he left the company, Paul DeRose was Krest's senior foreman and site supervisor. DeRose was first approached to become a foreman in 1978 by Doris Kosch, and over the years, he took on increasing responsibilities within the business. Mr. Jahn described him as "my right hand man". By the spring of 1986 Mr. DeRose was a director of Krest and held 6% of Krest's common shares. His share purchase agreement provided that if he left the business his shares would be re-purchased by the other shareholders over a period of 5 years, in blocks of ten shares, for the sum of \$66,000.00.

III

11. The numbered company now carrying on business as Canada Contracting was originally incorporated in or about February 1986 by John Kosch, Doris Kosch's husband. The ostensible purpose of the numbered company was to engage in the masonry contracting business - that is the same kind of business in which Krest was successfully engaged, and Mr. Kosch's wife and father-in-law had worked for many years. Mr. Kosch himself had no prior involvement with Krest and no experience whatsoever in the construction industry. He was described by Mr. Jahn as "some kind of scientist".

12. Mr. Jahn testified that he *never* discussed the activities of the numbered company with his son-in-law and was totally surprised when Mr. Kosch went into the bricklaying business. Doris Kosch testified that she, too, had never discussed her husband's proposed business initiative with him. Both witnesses told the Board that Mr. Kosch launched his fledgling masonry contracting business without any input from them at all - although Mrs. Kosch conceded in cross-examination that her father may have been aware of her husband's intentions.

13. Even in these days of spousal and family independence, that testimony is difficult to accept, given the fact that Mr. Kosch had no knowledge of the business in which he was about to be engaged, while both his wife and father-in-law had considerable experience in precisely that segment of the construction industry. Their testimony is also difficult to square with the fact that the *only* activity in which the numbered company was actually involved in the spring of 1986 was the bricking of two houses on a Canada Homes site where Krest was engaged to do the brick work, supplied the building materials to the numbered company, and apparently had to do some repairs for work improperly performed. Yet Mr. Jahn testified that he had no knowledge of the presence of Mr. Kosch on one of "his" construction sites, nor did he have any discussion with Lorne Liebel respecting, or to assist, his son-in-law's company. But why would Canada Homes, a large builder then building hundreds of houses, let a contract to the unknown and inexperienced John Kosch to brick only two houses as a non-union broker side by side with Krest - particularly when, as later testimony disclosed, Liebel considered it appropriate to approach Jahn to canvass any concerns about Canada Contracting working on its site when Paul DeRose had taken control of the Canada Contracting business? Is it likely that there would have been no enquiries at all of Mr. Jahn, or that neither Mr. Jahn nor his daughter would have any conversation about his son-in-law's proposed business venture? And, at the relevant time, it was Mrs. Kosch, on behalf of Krest, who was responsible for supervising the invoices for the building materials supplied to her husband's company. In the circumstances it is very difficult to believe that there were no discussions at all between Mr. Jahn and Mr. and Mrs. Kosch about the numbered company.

14. In late 1985 and early 1986 rumours began to circulate that Canada Homes was planning a massive expansion, assembling land to build as many as 5,000 new homes. This prospect presented something of a dilemma for Krest. Krest's existing capacity (i.e. with its then existing labour force of direct employees and subcontractors) could accommodate only about 1800-2000 homes. To remain Canada Homes' principal contractor would require both a significant expansion

of its direct or indirect labour force, and virtually a total dedication of all of its resources to building for Canada Homes, to the potential exclusion of other customers. More important, though, in the economic climate of 1986, the expansion of Krest would not be easy. There was a shortage of bricklayers either for direct hire or through engaging unionized subcontractors.

15. To expand its work force and production capacity, Krest would have to recruit quite a number of new employees to its regular work force, who would then be entitled to the wages and working conditions established in the collective agreement. Alternatively, Krest could engage subcontractors who would likewise be bound to those terms. However, because of its established contractual obligations, Krest had no ready access to the pool of non-union workers or subcontractors who might be prepared to work on lesser or less restricted terms thereby decreasing the risk and increasing the profitability of any proposed expansion. Conversely, if Krest could escape the restrictions imposed by the collective agreement, it might well be able to engage employees or subcontractors to meet Canada Homes' needs without the economic burdens flowing from its established contractual relationships. The collective agreement was an obstacle to the profitable expansion of its business.

16. According to Paul DeRose, in April of 1986 he sought and received permission from his fellow directors to leave Krest and establish his own company. Their "permission" was important because, while Canada Contracting was a nominal non-union competitor of Krest, DeRose continued to work in close cooperation and often in conjunction with Krest on residential projects built by Canada Homes. The understanding was that on a Canada Homes site, Krest would do the higher profit houses while Canada Contracting did the others; and, in any event, Canada Contracting undertook to purchase all of its building materials through Krest. That was the condition that Jahn had demanded of Liebel when the latter had asked whether there were any objections to DeRose's presence on a Krest/Canada Homes building site. The actual allocation of work depended upon Canada Homes' schedule of closings.

17. It is important to note that at the time Paul DeRose acquired an interest in the numbered company, it was little more than a corporate shell without reputation, established goodwill, or any other obviously attractive attributes. It had no bank account or accounts receivable. It had no pending contracts or prospective new customers. It had never declared a dividend. It had no equipment or other physical assets. It had no developed expertise even in the line of work in which it had been marginally engaged. It had no employees. There was no economic significance associated with its name. It had previously been conducted solely as a non-union "broker", engaging what Paul DeRose described as a single "shoemaker crew" to brick (rather badly in the result) two houses on a Krest/Canada Homes project. Even that endeavour was a failure because of faulty workmanship. The numbered company had no discernible value other than its association through family ties with Krest.

18. DeRose left Krest, on good terms, at the end of April 1986 to become involved in the numbered company as its sole Director, President and Secretary, replacing John Kosch in these positions. At the same time DeRose ceased to be a director or employee of Krest. However, despite the share repurchase agreement, his block of shares in Krest was not redeemed. Jahn testified that DeRose's shares in Krest had not been repurchased because his financial circumstances were temporarily "tight" as a result of obligations undertaken to build his own house. The situation of the other shareholders/directors of Krest was not canvassed in the evidence. Had the first block of his shares been liquidated in accordance with the terms of the agreement, DeRose would not have needed what he described as "seed money" to get Canada Contracting under way.

19. The "seed money" came from the spouses of the directors of Krest who each put in

small sums in return for a block of shares in Canada Contracting issued at a price of \$1.00 per share. Maria Galati contributed \$400.00 and received a block of 400 common shares. Connie Krille contributed \$2500.00 and received in return 2500 common shares. Anna Reimer contributed \$1400.00 and received 1400 common shares. John Kosch made no financial contribution but received 900 shares in addition to the 100 shares which he already owned. An entity known as Sanmar Sales, which was not then incorporated, contributed \$4100.00 and received 4100 common shares. The President and sole director of Sanmar is Margot Jahn, the wife of William Jahn, the President of Krest. Mrs. Jahn has 100 shares in Sanmar issued at a price of \$1.00 per share. The minority shareholders in Sanmar are Susan Barton and Karen Florecki with 10 shares each. Ms. Barton and Ms. Florecki are the daughters of William and Margot Jahn. Sanmar Sales has no commercial activity other than as a holding company for the shares in Canada Contracting. Paul DeRose contributed \$600.00 and received in return 600 common shares in the company.

20. In summary then, the total capital injected into the numbered company was a little under \$10,000.00. DeRose owns about 6% of the common shares, as he had done (and still does) in the case of Krest. Control over the numbered company lies in the hands of the spouses of the directors of Krest, and a “control block” (i.e. a little over 51% of the shares) rests in the hands of Mr. Jahn’s family members. The majority shareholders play no role in the active running of the company but, by virtue of their holdings, clearly retain legal control over its destiny.

21. In his quest for seed money for his new endeavour, DeRose testified that he never canvassed any other source of funds (a bank, for example), never even considered going to his fellow directors of Krest and never raised with any of them the proposed investments of their wives. Shortly after leaving Krest, DeRose accompanied the directors of Krest and their spouses to Las Vegas, but he maintained that no business was ever discussed. Nor, according to William Jahn, did he ever discuss with his wife her incorporation of Sanmar Sales as a vehicle for investing in what was (nominally at least) a rival masonry contractor.

22. That testimony, we think, should be placed in the same category as that of Doris Kosch and William Jahn, who with their years of experience in the masonry business claimed that they never discussed John Kosch’s abortive attempt to set up his own bricklaying company to do work on a Canada Homes site where Krest itself was doing the brick work and supplying all of the materials both to its own subcontractors and to the new numbered company. Their evidence is simply not plausible.

23. DeRose testified that he approached the Krest directors’ wives because he thought that this would guarantee him further financial backup if he needed it, and access to necessary building materials. On the evidence before us that could not occur without drawing upon the trade relations of Krest, one of which was a brick works in which Krest itself had an interest. There is no evidence that the spouses of the Krest directors are wealthy independent investors or entrepreneurs. The evidence regarding Sanmar (as well as the small sums involved) suggests that they are not. In reality, DeRose was relying upon the continued support and backing of Krest.

24. For some time Canada Contracting was little more than the shell it had been when first incorporated by John Kosch. It still had no assets, equipment, bank accounts, office space, employees or goodwill, other than the blessing of William Jahn, who was content to let Canada Contracting work side by side with Krest on the Canada Homes sites, bricking the less profitable houses, so long as Krest supplied the building materials (and, as we shall mention below, reaped - albeit indirectly - a significant financial reward). When Canada Contracting needed forklifts, they were rented from Krest with a corresponding “back charge”. Krest sold Canada Contracting a pickup truck which, for a time, was that company’s only tangible asset. Another useful asset was

an office computer/word processor which, once again was purchased from Krest. Krest even provided Canada Contracting with office supplies, and issued invoices for such minor items as stamps, courier services, and jackets, Christmas turkeys, and chocolates for favoured employees and business contacts. Mrs. Kosch explained that Krest provided these services because DeRose had no line of credit or arrangements with suppliers. DeRose testified that it was convenient to have Krest look after these details. Initially Canada Contracting had no offices of its own, carrying on business with the assistance of a part-time clerk in the offices of Krest's accountants. Canada Contracting is the only entity other than Krest's own subcontractors which is extended such facilities and, even so, it is apparent that the relationship between Krest and Canada Contracting is much closer than its relationship with its other subcontractors.

25. Despite its nominal capitalization and absence of employees or tangible assets, Canada Contracting has been a remarkable success. That success can be traced to several ingredients: the experience and enterprise of Paul DeRose, the ability to work in close cooperation with Krest on Canada Homes' projects, the access to materials, equipment or services provided by Krest but which would not otherwise have been available because DeRose had no credit rating or established relationship with suppliers, and, above all, the fact that Canada Contracting was "non-union" and therefore able to operate and engage subcontractors beyond the ambit and restrictions of the MCAT collective agreement. Canada Contracting could do what Krest could not: engage non-union subcontractors to work on Canada Homes' or other residential projects.

26. Mr. DeRose with considerable ingenuity and zeal has been able to engage quite a number of non-union subcontractors to brick homes for Canada Homes and other residential developers. The builders were promised access to the workers they needed to get the job done in an overheated residential housing market. The subcontractors and their employees were promised quick and reliable payment for their services - although not necessarily at rates or subject to the same terms as would be prescribed by the MCAT agreement. Operating outside the MCAT agreement, the subcontractors would not have to meet its terms or restrictions, and, operating as a non-union broker, without employees, Canada Contracting could minimize its own obligations.

27. In 1986 Canada Contracting engaged fifteen crews employing between 175 and 200 workers. In 1987 Mr. DeRose was coordinating and supervising the engagement of some twenty-five subcontractors employing 300 to 350 employees. His "gross sales" in 1986 amounted to about \$6 million - this we repeat with no real assets, equipment, credit facilities or direct employees. In 1987 his gross sales amounted to some \$14 million. However, Canada Contracting does not build anything with its own forces. It is not the direct employer of any bricklayers or other construction workers. Its profit arises from the difference between what it receives from builders for supplying skilled tradesmen and what it pays to the non-union subcontractors for the supply of those tradesmen's services. Canada Contracting prospers because it provides a vehicle to tap a source of non-union labour which can often be deployed in conjunction (rather than in competition) with the employees or subcontractors of Krest.

28. The business success of Canada Contracting as a non-union "broker" was immediately translated into a tangible financial return for its shareholders - that is, the spouses of the directors and owners of Krest. For his contribution of a moribund and somewhat tainted corporate shell, John Kosch, with no financial contribution whatsoever, had received by October 1987 the sum of \$37,500.00 as a "bonus". Mrs. Reimer, who had contributed \$1400.00, received as a bonus \$53,000.00. Mrs. Galati who had contributed \$400.00 received \$15,000.00. For Mr. DeRose's contribution of \$600.00 he took a bonus of \$22,500.00 in addition to a salary of \$60,000.00 in 1986 and \$120,000.00 in 1987. His total 1987 bonus has yet to be determined.

29. Sanmar Sales (Margot Jahn and her two daughters) the biggest shareholder in Canada Contracting with 4100 shares purchased at a price of \$4100.00 in May 1986, had, by October 1987 received bonuses of \$142,000.00. Yet, according to William Jahn, the President of Krest, his wife's incredibly successful investment, without any prior experience in the masonry contracting business and without any assistance from him or Krest, was never the subject of any discussion between them at all. That evidence, quite frankly, is simply not credible. If, as Mr. Jahn testified, his personal finances were "tight" and financial difficulties made it impossible for him or Krest to repurchase even the first \$10,000 block of Mr. DeRose's shares in Krest, would he be oblivious or indifferent to the \$142,000.00 paid to his wife's shell company, which had no other business activities except its investment in Canada Contracting, the company run by a former key man, director, and still shareholder of Krest, and which depended in so many ways upon Krest for its business success? We do not think so.

IV

30. Section 1(4) of the Act was enacted in 1971. It is designed to deal with situations where the economic activities giving rise to the employment relationships regulated by the Act are carried on via more than one legal entity. Where such legal entities are engaged in related economic activities under common control and direction, the Board is entitled to "pierce the corporate veil" and treat them as one business and one employer for the purposes of the Act. The Legislature has determined that legal form should not dictate (and possibly fragment) an established collective bargaining structure; nor should corporate restructuring undermine established bargaining rights. Because of section 1(4), collective bargaining and collective agreement rights are not treated as co-extensive with the legal framework of the business and, to this extent, labour law policy seeks to insulate collective bargaining from disruption should the exigencies of the market prompt the employer to change the number or form of the legal vehicles through which it carries on its business. Indeed, as a result of a 1975 amendment, section 1(4) does not now require that related business activities under common control or direction be carried on simultaneously or contemporaneously. That amendment reflects a legislative recognition that the essential unity and identity of a business (as opposed to its legal envelope) may be preserved even though the legal vehicles through which it may be carried on from time to time may not operate simultaneously.

31. A classic example of the "mischief" to which section 1(4) is directed can be illustrated by the situation considered by the Board in *Napev Construction Ltd.*, [1976] OLRB Rep. Mar. 109, (application for judicial review dismissed May 24, 1977, Ont. Div. Ct., unreported). In that case, Napev, the principal company, was bound to a collective agreement with the Carpenters' union which, for reasons which need not be explored here, Napev found too restrictive. To avoid those contractual obligations the principals of Napev created a new and allegedly independent company named "Vepan" which entered into less onerous commercial and collective bargaining relationships, claiming, when challenged, that by virtue of the common-law principle of "privity of contract" it was not bound by any of the obligations previously undertaken by Napev. It was clear to the Board, however, that Vepan was not a truly independent business, but rather merely a device to avoid the restrictions of the Carpenters' collective agreement. The Board declared that Napev and Vepan were one employer for the purposes of the Act and an application for judicial review to the Divisional Court was dismissed.

32. We do not cite *Napev* as necessarily representative of the dozens of cases which the Board has considered over the years, nor, in our view, is it necessary, here, to undertake an exhaustive review of those cases. We mention *Napev* only because it illustrates a recurring problem in the construction industry to which section 1(4) was specifically directed: companies with established contractual relationships may find it advantageous to "spin off" related but purportedly

independent companies which then carry on similar business activities either “non-union” or with more congenial collective bargaining partners.

V

33. In the instant case we have no doubt whatsoever that the requirements for a section 1(4) declaration have been met. Canada Contracting and Krest have been engaged in related business activities and, in practical terms, Canada Contracting remains under the control or direction of Krest - even though we acknowledge that Mr. DeRose has considerable freedom of action to develop the business. It is no accident that the principal shareholders of Canada Contracting just happen to be the spouses of the directors of Krest who have no previous experience in the construction business or any actual involvement in the running of Canada Contracting, yet receive remarkable rewards for their passive role. Nor is it merely coincidence that Canada Contracting has, so often, appeared on Krest job sites, working “non-union”, bricking the less profitable houses, with materials or other services used, back-charged by and paid to Krest. On the evidence before us it is difficult to resist the conclusion that Canada Contracting is merely an instrument, controlled by Krest, enabling Krest to avoid the restrictions of its collective agreement and prosper from non-union activities. Canada Contracting provided the vehicle to tap a non-union work force, to be employed on less profitable houses but at the same time ensure that the profits generated from that activity flowed back to the principals of Krest. Had Mr. DeRose sought independent financing (minimal as it was) and incorporated a company clearly independent of Krest, his previous association with that firm, even as a “key man”, might not have been very significant. But that is simply not the case here. Canada Contracting is not independent of Krest either legally or functionally.

34. On the basis of the evidence before us, we are satisfied that a section 1(4) declaration is warranted. We find that Krest and Canada Contracting are engaged in related businesses or activities under common control or direction. The remaining question on this branch of the case, though, is when that section 1(4) declaration should be effective.

VI

35. The evidence before us establishes that the union was aware of Canada Contracting as early as June of 1986 when it became actively involved in residential projects and the union was conducting a strike. Union business agents approached Mr. DeRose to complain about his presence on construction sites, warning that he would not “get away with it” although little or no effort was made to organize the “non-union” bricklayers working on those sites. Thereafter, there were discussions between the union and various members of MCAT, but no section 1(4) application was made. In other words, the union was well aware, two years ago, that Canada Contracting presented a potential threat to its bargaining rights/work opportunities but chose not to pursue the remedy clearly open to it. Canada Contracting was allowed to develop and grow despite the union’s current contention that it was merely a device to develop a non-union arm through the use of subcontractors. Business developed and flourished, contracts were entered into and completed, and relationships were established and terminated, while the union grumbled and complained but made no concrete effort to assert what it now claims are its statutory rights. It is understandable and indeed commendable that the union would seek an informal resolution of its concerns without resort to litigation, but there is also something to be said for the proposition that one should move promptly to assert one’s statutory rights under section 1(4). We do not think (as the respondents argue) that a failure to move expeditiously should totally foreclose the applicant from the remedy it seeks, but we are sympathetic to the plea that, if we are disposed to exercise our discretion to make a section 1(4) declaration, it should have either no or limited retrospective effect.

36. In the instant case, the numbered company carrying on business as Canada Contracting has no direct employees. No section 1(4) declaration that we might make would directly affect any employment relationships established since its incorporation in February of 1986. No previously unrepresented employees would be "swept in" to an established bargaining relationship. Furthermore, it is not at all clear what the result would have been if the expansion of Krest's business had to rely upon the union as the source of its labour requirements. It is common ground that the union had no unemployed members to send to Krest when it wanted to expand, so that any further requirements would have had to be satisfied through the recruitment of previously non-union workers or the engagement of subcontractors who previously had no union affiliation. That notional "unionized" expansion raises practical, speculative, and analytical problems which would have been entirely avoided if the union had moved quickly once it became aware of the potential erosion of its bargaining rights. We would not then have to speculate, as we now do, about what might have been or what would have been the case had Krest in 1986 expanded its business directly. Accordingly, while we do not fault the union for its efforts at a private resolution of its dispute with Krest, neither do we think it appropriate to give our section 1(4) declaration retrospective effect to February 1986 when the numbered company first became engaged in the masonry contracting business. In our opinion, an appropriate balance of the competing commercial, collective bargaining, equitable, and practical concerns, can be accommodated if our section 1(4) declaration takes effect as of the application date in this matter, and the date after which the respondents would have been clearly put on notice that their subsequent business activities might be affected by pending litigation.

VII

37. In view of our declaration that the respondents "Krest" and "Canada Contracting" are one employer for the purposes of the Act, and therefore both bound by the MCAT agreement, we find it unnecessary to consider the applicant's alternative argument that there has been a sale of part of Krest's business to Canada Contracting.

0311-88-R Brian Massé, Applicant v. The Built-Up Roofers, Damp & Waterproofing Section of the Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association, and Sheet Metal Workers' International Association Local 47, Respondent v. M & Al Roofing Ltd., Intervener

Construction Industry - Termination - Timeliness - Union certified pursuant to section 8 - Parties immediately bound by province-wide agreement - Termination application filed 10 weeks later during last two months of collective agreement - Application timely - Petition in certification case not an "unsuccessful application" which would allow the Board to exercise its discretion to bar the termination application

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Macey Schwartz* and *Brian Massé* for the applicant; *Bernard Fishbein* and *Ross Mitchell* for the respondent; *Alcide Thellend* and *Bernard Millaire* for the intervener.

DECISION OF MICHAEL BENDEL, VICE-CHAIR, AND BOARD MEMBER R. M. SLOAN:
August 4, 1988

1. The name of the respondent is amended to read: "The Built-Up Roofers, Damp & Waterproofing Section of the Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association, and Sheet Metal Workers' International Association Local 47".
2. This is an application for the termination of bargaining rights under section 57 of the *Labour Relations Act*.
3. At the outset of the hearing, counsel for the respondent asked that, before dealing with any other aspects of the application, the Board hear argument and rule on the respondent's objection to the timeliness of the application, as well as on a request, advanced by the respondent in the alternative, that the Board exercise its discretion under section 103(2)(i) of the Act so as to bar the application. The Board decided to accede to counsel's request. Accordingly, this decision is confined to those issues.
4. The application, as filed, sought to terminate the respondent's bargaining rights in respect of its two bargaining units of the intervener's employees. One unit was composed of roofers in the intervener's employ in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The other unit was composed of roofers in the intervener's employ in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector. At the hearing, however, counsel for the applicant requested leave to withdraw the application as it related to the non-ICI sector bargaining unit. Counsel for the respondent did not oppose the request. Leave was granted by the Board.
5. The facts are not in dispute. The Board (differently constituted) certified the respondent as bargaining agent for the two units described above in a decision dated February 19, 1988 (Board File No. 1330-86-R). Fewer than forty-five per cent of the employees in the bargaining units were members of the respondent at the material time. Certification was granted without a vote, however, pursuant to section 8 of the Act in view of the intervener's violations of the Act. There were filed with the Board two statements of desire or petitions, opposing the application for certification. In the circumstances of the case, the petitions were of no relevance.
6. At the time of the certification, a provincial agreement was in force between the Roofing Employer Bargaining Agency of the Ontario Industrial Roofing Contractors' Association, on the one hand, and the Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association, on behalf of various affiliated bargaining agents, including Local 47, on the other hand. By virtue of section 145(4) of the Act, the respondent, the intervener and the employees became bound by the provincial agreement upon the respondent being certified by the Board.
7. The provincial agreement covered the period from May 24, 1986 to April 30, 1988. The application for termination of the respondent's bargaining rights was filed on April 29, 1988.
8. At first blush, the application would appear to be timely since it was filed "after the commencement of the last two months of [the] operation" of a collective agreement that was for a term of not more than three years (section 57(2)(a)). The respondent, however, takes the position that it would be contrary to basic principles underlying the legislation for the Board to entertain this application for termination of bargaining rights since it was filed just ten weeks after the respondent was certified by the Board. Counsel for the respondent argues that, in the interests of

ensuring some labour relations stability and of giving a new bargaining agent some opportunity to show employees what it means to work under a collective bargaining regime, the Act protects the bargaining rights of a newly certified bargaining agent from attack by disaffected employees for a minimum of six months in the construction industry (section 123(1)) and a minimum of one year in other industries (section 57(1)). Moreover, section 103(2)(i) expresses a closely related policy that representation issues disposed of by the Board should not be reopened until the expiry of a decent period.

9. Specifically, counsel for the respondent argued that section 123(1) of the Act is a bar to this application. That provision reads as follows:

123.-(1) If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

That provision, counsel observed, is the construction industry counterpart to section 57(1), which reads as follows:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

By virtue of section 118 of the Act, section 123(1) prevails. Section 118 says the following:

118. Where there is conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail.

(On the relationship between section 57(1) and section 123(1), counsel referred to *International Union of Operating Engineers, Local 793*, [1986] OLRB Rep. Aug. 1097.) Counsel argued that, as of the date of this application, less than six months had passed since the respondent's certification and, during that time, the respondent had not made a collective agreement with the employer. The application was therefore untimely by virtue of section 123(1). Counsel readily acknowledged that the respondent and the employer could not have entered into a collective agreement with each other in view of section 146(2) of the Act, which prohibits any collective agreement (other than the provincial agreement) applicable to employees represented by an affiliated bargaining agent in the ICI sector. But, although it may have been impossible for these parties to make a collective agreement, the fact remained that they did not make a collective agreement within the six months following certification, with the result that a termination application was not timely until after the six-month period. Counsel drew our attention to some comments in *R.L.D. Electric*, [1986] OLRB Rep. Aug. 1145, which suggest that section 123(1) has no application where an affiliated bargaining agent becomes bound to a provincial agreement upon certification. Counsel argued that those comments were *obiter* and were wrong.

10. In the alternative, counsel for the respondent asked the Board to exercise its discretion under section 103(2)(i) of the Act, which reads as follows:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or

trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

Counsel invited us to decide that the request by the petitioners in the application for certification that a representation vote be held constituted an “application” within the meaning of section 103(2)(i). That “application” was unsuccessful. It was obviously presented by employees of the intervener who were opposed to the respondent becoming the bargaining agent, and the present application for termination is presented by employees opposed to the respondent remaining the bargaining agent. Opponents to the respondent among the intervener’s work force therefore had their chance to have employee support tested by a vote and they were unsuccessful. It was precisely to prevent the resubmission of applications in such circumstances that the legislation had given the Board the power contained in this section. Counsel traced the development of the Board’s case-law on the subject, both before and since the enactment of section 103(2)(i), referring in particular to the following cases: *Trinidad Leaseholds*, 52 CLLC ¶17,005; *Filey-Hall Paper Box Co. Limited*, 52 CLLC ¶17,037; *Windsor Lumber Co. Ltd.*, 58 CLLC ¶18,104; *Canadian Sealright Co. Ltd.*, 59 CLLC ¶18,157; *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791; and *Dunville Supermarket Limited*, [1980] OLRB Rep. Aug. 1193. Counsel also argued that the Board’s discretion under section 103(2)(i) could be exercised to bar any application under the Act: *Browning-Ferris Industries Ltd.*, [1982] OLRB Rep. Sept. 1253; and *R.L.D. Electric*, (*supra*).

11. Counsel for the applicant argued that the application for termination is timely under section 57(2)(a) of the Act, which reads as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.

No provision of the Act makes it untimely. Section 123(1) merely abridges, for the construction industry, the period of protection provided for by section 57(1). Reference was made to Sack & Mitchell, *Ontario Labour Relations Board Law and Practice* (1985), at page 604. As for the respondent’s reliance on section 103(2)(i), counsel for the applicant denied that there had been a previous “unsuccessful application” so as to give the Board a discretion to bar this application. The petitions presented in relation to the earlier application for certification did not constitute “applications” within the meaning of the section.

12. In *R.L.D. Electric (supra)*, at page 1149, the Board made the following comments about the desirability of a new bargaining relationship in the construction industry being sheltered from termination applications for a reasonable period of time:

19. ... After certification, the parties require a period of time in order to develop a sound bargaining relationship. The employer, trade union and the employees need an opportunity to develop an understanding of what it means to operate and to work within a collective bargaining regime. This is particularly so in the ICI sector and perhaps also in other sectors of the construction industry where parties may not be active participants in the bargaining process. Since the collective agreement which binds them is negotiated by others on their behalf, the only avenue for the development of the relationship is the day-to-day administration of the collective agreement. The recognition that a period of time is needed for the parties not only to negotiate a collective agreement, but also to provide a basis for creating a bargaining relationship, is implicit in sections such as section 123(1) of the Act.

13. Those considerations are even more compelling in the case of the present application, since certification was granted pursuant to section 8 of the Act. However, it goes without saying

that our powers are those conferred by the Act, and that we can only provide this protection to the respondent if the Act requires or authorizes us to do so.

14. We agree with counsel for the respondent that section 123(1) is the construction industry counterpart to section 57(1) and that it prevails over section 57(1) by virtue of section 118. We would note, however, that the balance of section 57, including section 57(2), remains fully applicable to the construction industry.

15. The present case discloses a significant but subtle difference between the construction industry provisions and the general provisions of the Act in the area of termination applications.

16. Outside of the construction industry, section 57(1) does not authorize applications for termination during the first year following certification, unless a collective agreement is made before the year is up. And, if a collective agreement is made during that time, it must perforce be for a period of at least one year (section 52). In such a case, no application for termination could be brought until the last two months of the operation of the agreement (section 57(2)(a)). The shortest possible period of protection would occur in the unlikely scenario of a one-year collective agreement being executed the same day as the bargaining agent is certified, when the bargaining agent would enjoy a ten-month respite before having to be ready to stave off a challenge to its bargaining rights from disaffected employees.

17. In the case of the construction industry, a modified model is in place. The obvious difference is that the one-year period has been replaced by a six-month period (section 123(1)). However, what is less obvious is that the possibility exists in the construction industry of bargaining agents being bound by collective agreements for very short periods as a result of being “plugged in” to existing collective agreements upon certification. When this occurs in the ICI sector, it is provided, in section 145(5), that the agreement ceases to operate according to its terms, even though a new bargaining agent might have become subject to it when less than one year remained of its original period of operation. Thus, unlike other bargaining agents, the newly certified bargaining agent in the construction industry might be bound, upon certification, by a collective agreement nearing expiry. In order to appreciate what this means for the vulnerability of bargaining agents in the construction industry to termination applications, it is critical to understand the scheme of the legislation as it relates to open periods. The legislation does not say that applications for termination are prohibited at certain times; rather, it says that they are permitted at certain times. Outside the construction industry this distinction is an academic one, since open periods cannot overlap: for any given bargaining unit, the period when an application for termination might be brought under section 57(1) and the period when it might be brought under section 57(2) are mutually exclusive. In the construction industry, however, section 57(2)(a) allows applications to be made “after the commencement of the last two months of [the] operation” of a “collective agreement for a term of not more than three years”; and section 123(1) allows them to be made after the expiry of a six-month period commencing with certification if, within that period, the trade union has not made a collective agreement. Those two open periods can overlap if, as here, a newly certified bargaining agent is “plugged in” to an expiring collective agreement upon certification. It is in such a case that it is important to note that section 57(2)(a) and section 123(1) both establish open periods; they do not establish closed periods. It is true that the effect of section 123(1), in the usual case, will be to prevent applications being made during the first six months following certification, since there will be no other statutory authorization at the time for bringing such an application. However, the language of these provisions is permissive and not prohibitory. As we read the legislation, therefore, an employee who could not bring the application in accordance with section 123(1) is not thereby precluded from bringing it in accordance with section 57(2)(a) if the application is timely under that section.

18. It would be idle for us to speculate whether it was intended by the Legislature that a newly certified bargaining agent in the construction industry might risk losing its bargaining rights before the ink is dry on its certificate. It might have been an oversight, or it might have been regarded as an inevitable concomitant of the system of multi-employer bargaining in the construction industry.

19. We have concluded that the present application was made in compliance with section 57(2)(a) of the Act. Although the respondent presented no argument on the point, we have considered the possibility that the recognition clause in the provincial agreement might not be sufficiently broad to cover the intervener. If that were the case, it might be argued that the applicant was not an “[employee] in the bargaining unit defined in [the] collective agreement”, within the meaning of the opening words of section 57(2), but had merely become bound by reason of section 145(4). However, it would appear that any such argument would be foreclosed by the Board’s decision in *Culliton Brothers Limited*, [1983] OLRB Rep. March 339. We see no other basis for doubting the applicant’s compliance with section 57(2)(a).

20. Having reached the conclusion that the application is timely under section 57(2)(a), we do not believe that it is necessary for us to express any concluded opinion on whether it is also timely under section 123(1). As we explained earlier in this decision, all that an applicant has to do is to bring the application in an open period specified in the Act. Section 123(1) is not a prohibitory provision.

21. We turn now to the respondent’s alternative request, namely that the Board exercise its discretion under section 103(2)(i) and bar this application. The respondent has argued that the petitions presented by employees in the context of the application for certification constituted an “unsuccessful application”, within the meaning of section 103(2)(i), with the result that we have a discretion that we can exercise.

22. The Board cannot accept that it has any discretion to exercise in the circumstances of this case. We are of the view that the only application that could count as an unsuccessful application for the purposes of section 103(2)(i) would be an “application” within the meaning of the Act. On the basis of elementary principles of statutory interpretation, we do not believe that it would be proper to interpret the word “application” in section 103(2)(i) as extending to processes or proceedings that are not described in the Act itself as applications. In any event, a petition of the kind that is alleged by counsel for the respondent to be an application is not even a statutory process, in the sense that the Act itself makes no mention of it. We cannot accept that section 103(2)(i) was intended to have the effect of permitting the Board to bar an application authorized by the Act on the ground that some earlier non-statutory proceeding or motion before the Board had been unsuccessful.

23. It follows that the respondent’s objection to the timeliness of the application and its request, in the alternative, that we exercise our discretion to bar the application must both be dismissed.

24. The matter is referred to the Registrar for the scheduling of a hearing to deal with the other aspects of this application.

25. This panel is not seized.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG; August 4, 1988

1. The Board (differently constituted) certified the respondent as bargaining agent on Feb-

ruary 19, 1988, (Board File No. 1330-86-R) pursuant to section 8 of the *Labour Relations Act*, in view of the employer M & A1 Roofing Ltd.'s violations of the Act. Two statements of desire, opposing the application of the union for certification were filed and found not to be relevant.

2. In my opinion, it makes no labour relations sense to entertain an application for termination of bargaining rights ten weeks after certification. In the circumstances of this case nothing would change over this short period; the union had no opportunity to show members of the bargaining unit what stability would be under a collective agreement.

3. The Board should exercise its discretion and dismiss this application for termination.

0045-88-R Hotels, Clubs, Restaurants and Tavern Employees Union, Local 261, Applicant v. Skyline Ottawa (1980) Limited and 709212 Ontario Limited carrying on business as **Master's Brew Pub & Brasserie**, Respondents

Sale of a Business - Whether sale of a business from Skyline Hotel of its lounge to Master's Brew Pub - Lounge closed due to declining business - Integration of Skyline's facilities with those of Master's not necessarily leading to a conclusion of sale - Evidence indicating a landlord and tenant relationship only - Application dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. H. Wightman* and *D. A. Patterson*.

APPEARANCES: *Sean McGee*, *Frank Grella*, *Steve Welchner* and *John Kearney* for the applicant; *Eleanor S. Dunn* for Skyline Ottawa (1980) Limited; *Bryan Carroll*, *Tom Barton* and *Grant Dunn* for Master's Brew Pub & Brasserie.

DECISION OF THE BOARD; August 12, 1988

1. At the completion of the hearing in this matter, the Board recessed and then reconvened to give the following oral ruling:

1. The name of York Hanover Hotels Limited is deleted and the name of Skyline Ottawa (1980) Limited ("Skyline" or "the hotel") is added as a respondent to the style of cause.
2. The applicant, Hotel, Clubs, Restaurants and Tavern Employees Union, Local 261 ("the union") seeks a declaration under section 63 of the *Labour Relations Act* ("the Act") that there has been a sale from Skyline of that portion of its business which comprised the food and beverage service in "Initials", a lounge operated by the hotel, to 709212 Ontario Limited carrying on business as Master's Brew Pub & Brasserie ("Master's" or "the Brew Pub") and that Master's is therefore bound by the collective agreement between Skyline and the union.
3. The thrust of the union's case is that Skyline intended to contract out

various aspects of its operation and to that end decided to contract out or sell one of its food and beverage operations, namely Initials, to an entity which would carry on its own food and beverage operation, not in the space occupied by Initials, but in that left vacant when the Skyline's coffee shop, the Trellis Room, was closed January 2, 1987. Master's opened in January 1988, just over a year later. Initials had closed in November 1987. We are satisfied that the Skyline closed Initials because of declining business. The evidence was that the food and beverage operations at the Skyline had not been doing well financially and that various attempts were made to deal with that problem, including changes in theme [(for example, Initials had earlier been called "Ryders" with a sports theme and before that "Diamond Lil's", a "gay nineties" bar)], as well as reduction in hours of operation or in the type of service provided. That was also the case with the Trellis Room which was at one time open for dinner, then no longer offered dinner, and then changed its buffet lunch to sandwiches only and at the time of closing was offering primarily breakfasts. It was decided that the Trellis Room breakfast business would be better channelled to two other rooms on the hotel's second floor, Le Trianon and Light Affair [(previously called "Henry VIII")].

4. In light of the decision we make in this case we do not have to decide whether the sale of a portion of a business can occur if the successor business occupies different space than the predecessor business. We also assume for the purposes of this case that the nature of the business of Initials, that is, as a food and beverage operation, is the same or similar to that operated by Master's, even though the emphasis is rather different.
5. The factors and considerations which the Board applies in section 63 cases are set out in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (see para. 16), and *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; the cases also make it clear that the word "sells" is to be interpreted broadly. The Board will look, for example, at whether there has been a transfer of physical assets, skills or good-will, and at the presence of non-competition covenants, the continuity of the nature of the business and the continuity of employees. As the Board said in *Metropolitan Parking*, *supra*, at para. 31, "if the elements formerly used by 'A' to carry on business are now in the hands of 'B' and used for the same business purpose, it is difficult to resist the conclusion that there has been some form of transfer from 'A' to 'B'..." Apropos of this case, the Board put the question as follows in *Gordons Markets*, [1978] OLRB Rep. July 630, at para 18: "whether or not the business carried on by [B] ... is a continuation of [A's] ... or whether it is a separate and parallel business, albeit of the same nature".
6. The documentary evidence indicates that this is a landlord-tenant relationship. That evidence must be assessed in the context of all the evidence, however, to ensure that what appears to be on the surface

is in fact what happened. The Board has consistently taken the view that it is the substance of the transaction which matters, not the form: *Metropolitan Parking, supra*, at para. 27. In our view, however, not only the form but also the substance of this transaction leads us to conclude that there was not a sale of a business from Skyline to Master's.

7. Master's, or two of its eventual principals, Thomas Barton and Peter Cantelon, became interested in developing a brew pub in downtown Ottawa and were attracted to an advertisement placed in the *Ottawa Citizen* by the Skyline which explained that the hotel would have vacant space available as a result of renovations. They looked at other space in the downtown Ottawa area, as well as three different spaces in the hotel, but none of it was appropriate for the heavy equipment required for brewing beer which was the *raison d'être* of the Brew Pub, except the space vacated by the Trellis Room. After some discussion with Gaeton Rozon, vice-president development of York-Hannover Hotels, a management company with which the Skyline has a management contract, Mr. Barton, Mr. Cantelon, Richard Willan and Jean-Paul Taillefer, who were the eventual shareholders of 709212 Ontario Limited, put forward a proposal to establish and operate a brew pub in the Skyline. Counsel for the union made much of the emphasis in the proposal on the "integration" of the proposed brew pub with the Skyline's own facilities; for example, it read that the menu would not be "in indirect competition with the other elements of the Skyline Hotel, but will be in total co-operation with them so as to ensure an integrated food service for hotel guests and outside clientel."
8. A commercial landlord's desire for integration of its facilities with those of its tenants or for an assurance that the tenant will not detract from or compete with its own services and operations does not necessarily lead to the conclusion that there has been a sale. It is quite consistent with a landlord-tenant relationship that the landlord would establish rules and standards in harmony with its own self-image as an institution offering services to the public. Nor does the fact that both the Skyline and Master's desired to establish an association in the *public's* mind, as suggested by reference in the advertising brochures of the Skyline that there was a brew pub on its premises (as there was a beauty salon or car rental agency, both apparently independently established entities) and by reference by Master's to its location in the Skyline's complex in *its* advertising, mean there has been a sale within the meaning of section 63.
9. One of Master's shareholders, Richard Willan, had been an employee of the Skyline as a waiter in its food and beverage facility. He did provide know-how to Master's but we are satisfied that in this instance he terminated his employment with the Skyline in order to participate in a new and separate business. Similarly, the hiring by Master's of employees terminated by the Skyline when it closed Initials, does not in itself mean there was a sale. Those employees were

interviewed and hired by Master's, along with other persons and as there were few of them, they constitute a small portion of Master's staff. [None of the indicia relevant to a finding that there has been a "sale" are present in the arrangement between the Skyline and Master's to lead to a conclusion that it constitutes a sale under section 63.]

10. [In sum, we find that Master's is a separate and parallel business to the food and beverage facilities operated by the Skyline both prior to and concurrently with the establishment and operation of the Brew Pub.] We therefore dismiss this application.

3238-87-R; 3239-87-U; 0433-88-R International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230, Applicant/Complainant v. Pavage et Bétonnière St-Eustache Ltée (carrying on business as **Mathers Concrete**), Respondent; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230, Applicant v. Pavage et Bétonnière St-Eustache Ltée (carrying on business as Mathers Concrete), Respondent v. Daniel Olivier on behalf of a group of employees, Objectors

Certification - Membership Evidence - Timeliness - Employee objectors requesting an extension of the terminal date - Board exercising its discretion not to extend terminal date - Time is of the essence in certification matters - Both Form 6 and poster clearly explain how objections must be filed - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

APPEARANCES: *David McKee* and *Marcel Villeneuve* for Teamsters Local 230; *Andra Pollak*, *J. P. Belhumeur* and *Robert Latour* for the respondent; *Daniel Olivier* for the objectors.

DECISION OF THE BOARD; August 10, 1988

I

1. The name of the respondent is amended to read: "Pavage et Bétonnière St-Eustache Ltée (carrying on business as Mathers Concrete)".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that the unit of employees appropriate for collective bargaining should be framed as follows:

All employees of the respondent in the Regional Municipality of Ottawa-

Carleton save and except foremen, persons above the rank of foreman, office, clerical and sales staff.

There are about a dozen employees in this bargaining unit.

5. This matter was originally scheduled for hearing together with a claim under section 63 of the Act that the respondent was a "successor employer" to an entity with subsisting bargaining rights with the union, and certain further allegations that the respondent had engaged in illegal conduct. The parties were agreed, however, that these issues need not be pursued pending a resolution of the objectors' request for an extension of the terminal date. It was also agreed that if that matter were resolved in the union's favour, it would probably be unnecessary to consider either of the union's alternative claims, and they would both be withdrawn.

II

6. This application for certification was filed on May 13, 1988. Rule 2 of the Regulations governing the Board's procedure reads as follows:

2. When an application is made, the registrar shall fix a terminal date for the application which shall be not less than five and not more than ten days, as directed by the Board, after,

- (a) the day on which the registrar serves the employer with the notice of application for posting, where they are served personally; or
- (b) the day immediately following the day on which the registrar mails the notices of application to the employer for posting, where they are served by mail.

In accordance with Rule 2, the Registrar fixed Monday, May 30th, as the terminal date.

7. The terminal date is the date by which documentary evidence of membership in a trade union or objections by employees to certification of a trade union must be filed with the Board (see Rule 73). A document is deemed to be "filed" with the Board either when it is actually received, or when it is mailed to the Board by registered mail. Both the regulations and the Board's practice contemplate expedition. Time is of the essence in certification matters. As Laskin, J.A. observed in *Hotel and Restaurant Employees and Bartenders International Union, A.F.L., C.I.O., C.L.C., Local 197 and Ontario Labour Relations Board v. Nick Masney Hotels Ltd.* (1970) 70 CLLC ¶14,020:

"The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer, since the certification is merely the first step in an often laborious collective bargaining process ..."

In *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild et al* (unreported, March 31, 1977 Ontario Court of Appeal) Estey, J.A. put it this way:

"Labour relations delayed is labour relations defeated and denied."

That is why the Rules prescribe relatively "tight" time frames for the filing of material in certification applications.

8. The evidence discloses that the notices to employees in Form 6 (in both the English and

French languages) were posted by the employer between 9 and 10 a.m. on Friday, May 27, 1988. The Form 6 notice clearly indicates that employees who wish to register an objection to the certification application may do so by mailing such objection to the Board by the terminal date. That notice, prescribed by the Regulations, was augmented by an additional explanation of employee rights, in poster form, which was also sent to the employer for posting on its premises where it would come to the attention of the employees potentially affected by this application. The poster, in question-and-answer format, includes the following:

What is the terminal date?

The terminal date is set by the Board. It is normally seven to ten days following the date the application for certification was received. *This is the date by which the trade union applying for certification must file its membership evidence and interested employees must file any documents expressing opposition to certification of the trade union or revoking that opposition.* Material sent by registered mail on or before the terminal date is considered to have been filed as of the date of mailing. Otherwise documents are filed when they are received by the Board.

If documents opposing the union or indicating an employee no longer wishes to oppose the union are not received by the Board by the terminal date or sent by registered mail to the Board by that date, the Board generally refuses to consider them.

Evidence of employee wishes is kept confidential by the Board.

Accordingly, the dozen or so employees affected by this application were advised precisely what to do to register their objection, and that it had to be mailed by May 30th. We were also told that on Friday, May 27th, the day the notice was posted, a group including most of the bargaining unit employees met to consider the matter, but nothing was done in a concrete way until the following week when one of their number consulted with a lawyer.

9. Late Monday, May 30th, a representative of some of the employees met with a solicitor to discuss their options. That solicitor promptly wrote to the Board requesting an extension of the terminal date. However no statement of employee opposition was actually delivered to the Board until Friday, June 10, 1988, the date of the hearing. As Daniel Olivier, the representative of the employees explained, it was only well after the terminal date that he and some of his fellow employees had "got their act together". Mr. Olivier also confirmed that by Friday, May 27th, everyone had read the explanatory notices and knew that it was necessary for objectors to sign a document opposing the trade union if their position was to be taken into account by the Board. Yet the document which he proposed to file at the hearing on June 10th was itself dated June 8, 1988, nine days after the terminal date. Nevertheless Mr. Olivier urged the Board to extend the terminal date to at least June 10th in order to allow him to file that document which otherwise would be untimely.

10. Pursuant to Rule 82 of the Board's Rules of Procedure, the Board has the authority to extend the time for filing of material, including documentary evidence of membership or employee statements of opposition to a union's certification. In this case however, the Board declined to exercise that discretion.

11. The bargaining unit here is very small. All employees potentially affected by the application had notice by Friday, May 27th, of what they had to do to register their opposition, and they had four days to do it. There is no great formality involved - as indicated by the form of the document which Mr. Olivier eventually sought to put before the Board on June 10th. All that is necessary is a simple statement indicating opposition to the union's certification. However, the statement which Mr. Olivier urged us to receive was not prepared until June 8th and not actually received by the Board until the date of the hearing, eleven days after the prescribed terminal date.

While it is understandable that some employees may have wanted additional time to consider their positions or consult with a solicitor to explore the legal options open to them, the fact of the matter is that they had until May 30, 1988 to register an objection to the union's certification, or by their silence or inaction indicate to the Board that they were content to have the matter decided on the basis of the documentary evidence of union membership then before it - which, we note, in this case, indicates the unequivocal support for the union by more than 55% of the employees in the bargaining unit. That union membership evidence was filed in accordance with both Rule 73 and sections 1(1)(l) and 103(2)(h) of the Act, and was received by the terminal date. Finally, as we have already mentioned, time is of the essence in certification matters. Both the Rules and the Board's practice contemplate the prompt filing of material respecting employee wishes either for or against the trade union.

12. We should also note (as we did at the hearing for Mr. Olivier's benefit and here record) that an employee who has not signed a union card is automatically treated as someone who does not support the certification application. No formal step is necessary. The only real significance of a petition of the kind Mr. Olivier sought to file, is that it may indicate that some union members have changed their minds after signing union cards and prior to the terminal date, and may wish to have that fact recorded in documentary form as required by the Act and Rules. If such change of heart is filed in a timely fashion, and is voluntary, the Board will take it into account in dealing with the certification application and may direct a representation vote to clear up the matter. But all simple expressions for or against the trade union must be filed (which means at least sent by registered mail) by the terminal date.

III

13. Following the Board's ruling at the hearing that it was not prepared to extend the terminal date, the Board proceeded to consider the other issues in the case: the description and scope of the bargaining unit, the number of employees in that unit, and the number of employees who, by the terminal date, had signified their support for the trade union by documentary evidence meeting the statutory and regulatory requirements of section 1(1)(l) and section 103(2)(j) of the Act, together with Rule 73 of the Regulations. After a determination of the scope of the bargaining unit, a review of the union's documentary evidence of membership, an indication that the union appeared to be in a "certifiable" position, and further explanation for the benefit of Mr. Olivier (who was not represented by counsel) as to why we had not been disposed to extend the terminal date, and our proposed disposition of the case, Mr. Olivier mentioned, for the first time, that there may exist another document which *might* meet the requirements of the regulations and *might* have been filed by the terminal date. Mr. Olivier asserted that, as he understood it, some employees had signed the Form 6 notice itself in a way which might signify their opposition to the union. He believed that another employee, who was not present at the hearing, had mailed that material to the Board. However, he had no direct evidence in this regard and was relying solely upon what a fellow employee had told him. That employee was not present at the hearing nor was any copy of the document produced.

14. Counsel for the union protested that this proceeding should not be derailed because of the *possible* existence of a document which *might* have been relevant if filed in a timely way; moreover, if a copy of such document existed, it should have been available at least by the date of the hearing. Counsel pointed out that Mr. Olivier did not come to the hearing in anticipation of supporting this annotated Form 6 (as would be required by Rule 73(5)), and had no direct knowledge that it had ever been mailed to the Board. In short, he was not caught by surprise by the absence of a document upon which he planned to rely, and adverted to it only obliquely, at the conclusion of the proceeding. Before that, neither the objecting employees nor their solicitor had indicated the

existence of, or intent to rely on, this annotated Form 6 (as opposed to the objectors' petition which Mr. Olivier sought to file, belatedly), nor had they suggested that this was the timely statement of objection which the Board should take into account. Counsel for the union characterizes Mr. Olivier's representation as a convenient and self-serving afterthought and reserves his right to lead evidence about what was going on in the plant at the time, should the document surface and the Board decide that it should be received. Nor, without evidence, was the union prepared to concede that the document ever was filed, or that its form or the circumstances in which any signatures might have been obtained reflect a voluntary change of heart of its previous supporters.

IV

15. On the basis of the evidence before the Board, the union was clearly entitled to certification. More than fifty-five per cent of the employees in the bargaining unit had signified their desire for trade union representation by signing membership cards which met the requirements of the Act and were filed in a timely fashion. However, in view of the employee representative's submission that there *might* be some other document properly filed, and bearing upon this determination, or the exercise of the Board's discretion to enquire further or direct the taking of a representation vote, the Board issued this decision:

DECISION OF THE BOARD; June 13, 1988

1. At the hearing in this matter on June 10, 1988, the representative of the objecting employees indicated that a document, potentially relevant to these proceedings, had been sent by registered mail on May 30, 1988 - that is, prior to the terminal date. The Board has no record of receiving this document. Accordingly, the parties (including the representative of the objectors) agreed that the objectors would have until June 20, 1988 to make submissions to the Board on this matter. Such submissions should include the nature and contents of the alleged lost document, the circumstances surrounding its mailing to the Board, and the objectors' proposed disposition of this proceeding in the event that the facts asserted can be proved. Failing receipt of such submissions, a certificate will issue because the trade union has documentary evidence of membership for more than fifty-five per cent of the employees in the agreed bargaining unit.

16. In response to the Board's decision the objecting employees did not, through their counsel or otherwise, record their submissions concerning "circumstances surrounding the alleged lost document's mailing to the Board". Indeed, they did not assert that it ever was, in fact, mailed to the Board; and from counsel's written submissions one can only conclude that an annotated Form 6 notice was not sent by May 30, 1988, the terminal date, and that it may still be in the possession of the objectors or their counsel. We cannot conclude that a potentially relevant document has, somehow, been lost in the mails, nor, in all the circumstances, are we prepared to reopen the hearing for the purpose of receiving further material.

17. The Board is satisfied on the basis of all the evidence put before it in a timely fashion, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 30, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

18. A certificate will issue to the applicant in respect of the bargaining unit described at paragraph 4.

0986-88-JD Labourers' International Union of North America, Local 837, Complainant v. **Maxibo Incorporated** and United Brotherhood of Carpenters and Joiners of America, Local 18, Respondents

Jurisdictional Dispute - Strike - Work assigned to Labourers Union - Alleged threat by Carpenters Union to install a picket line if work not re-assigned - Several labourers laid off as a result of threat - Labourers Union seeking interim order that labourers be re-hired to complete the work - Work completed by end of application date - Board declining to make order that would be academic

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *S. B. D. Wahl* and *S. DeLuca* for the complainant; *André Pepin* for the respondent Maxibo Incorporated; *S. Simpson* for the respondent United Brotherhood of Carpenters and Joiners of America, Local 18.

DECISION OF THE BOARD; August 5, 1988

I

1. This is an application under section 91(8) of the *Labour Relations Act* which reads as follows:

Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

The work in dispute involves the dismantling, transport, and reassembly of metal and masonite shelving. That work is being done in connection with the move of a retail store from one location in the East Hamilton mall to another. The employer has collective bargaining relationships with both the Carpenters' and the Labourers' unions. The work was originally assigned to and partially completed by Labourers.

2. The applicant contends that an official of the Carpenters' union threatened to install a picket line (which would induce a work stoppage) if the work were not reassigned to members of the Carpenters' union. As a result, several labourers were laid off. The applicant seeks an interim order restoring the previous status quo and requiring the employer to rehire labourers to complete the tasks to which they had previously been assigned. The respondent Carpenters' union contests both the Labourers' characterization of the facts and the utility of an interim order. The employer indicates that he is a carpenter himself, continues to use carpenters for carpenters' work, believes his initial assignment to be proper, but now finds himself "caught in the middle".

II

3. We agree with the applicant's submission that a trade union should not secure an advantage by threatening an unlawful strike or illegal picketing. We further agree that applications under section 91(8), involving, as they do, an "imminent strike" in connection with a jurisdictional dispute should be processed by the Board with the same urgency and expedition as strike applications under section 92 of the Act - subject always to the requirement that affected parties must be given notice. However, in the instant case, it is not disputed that the work in question will be completed

by the end of the business day on which the application came before the Board for consultation with the parties. Accordingly, any interim direction that we might make with respect to the assignment of that work would be entirely academic. The Board therefore declines to make any interim order. Such determination is, of course, without prejudice to the rights of any of the parties when and if this jurisdictional dispute proceeds to a hearing on the merits.

0596-88-R Labourers' International Union of North America, Local 493 v. McEndon Limited, Respondent

Certification - Construction Industry - Whether persons listed on Schedule D should be considered to be employees in the unit for purposes of the count - Board not applying "30/30" rule in construction industry certification applications - Schedule D persons not included - Certificate issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

DECISION OF THE BOARD; August 18, 1988

1. In this application for certification, the Board, by decision dated July 7, 1988 made various determinations, including the description of the appropriate bargaining unit, and authorized a Labour Relations Officer to inquire into the list of employees in that bargaining unit. The parties subsequently entered into Minutes of Settlement by which they agreed upon two schedules of employees; Schedule "A" being a list of employees of the respondent who were actually at work in the bargaining unit on the application date and Schedule "D", being a list of employees of the respondent who were not at work in the bargaining unit on the application date.

2. The Minutes of Settlement stated that the respondent takes the position that the employees on both Schedule "A" and Schedule "D" should be considered by the Board in determining the count, that is, the number of employees in the bargaining unit as of the time the application was made, and also requested the opportunity to make representations at an oral hearing before the Board. Counsel for the respondent, in response to a direction from the Registrar, filed the representations he wished the Board to consider with respect to whether the persons listed on Schedule "D" ought to be considered as employees in the bargaining unit for purposes of the count and again requested that a hearing be scheduled to deal with the matter.

3. The Board, pursuant to section 102(14) of the Act, may dispose of an application for certification made pursuant to the construction industry provisions of the Act without holding a hearing. In this case, the respondent has been given the opportunity to file written submissions which contain factual assertions that the Board accepts as fact in dealing with this matter and as counsel for the respondent has submitted the representations he wants the Board to consider, there is no need to convene a hearing into this application for certification.

4. The respondent is a general contractor engaged principally in utilities construction. A majority of its employees, including almost all of the employees on Schedule "D", have had long-term employment relationships with the respondent. The employees on Schedule "A" were working within the bargaining unit on the date the application was made while the employees on Schedule "D" were employed by the respondent and were working on construction projects outside of

the bargaining unit on the application date. Nevertheless, the employees on Schedule "D" did work within the bargaining unit at some time both 30 days before and 30 days after the date the application for certification was made.

5. Section 7(1) of the *Labour Relations Act* requires the Board to ascertain the number of employees in the bargaining unit at the time the application is made and the number of those employees who are members of the applicant at a time fixed by the Board, which is usually the terminal date. While employment circumstances are not static, and in the construction industry in particular, the number of employees working in a particular bargaining unit will change over a period of time, the *Labour Relations Act* requires the Board to make its determination with respect to the number of employees in the bargaining unit as of a specific point in time, which is fixed by the Act as being the time the application was made. The Board's approach to the making of this determination was described in *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. April 364 at 365-66:

"In determining whether an employee is employed within a bargaining unit for purposes of an application for certification made under the construction industry provisions of the *Labour Relations Act*, the Board is required by section 7(1) of the Act to assess the circumstances at the time the application is made. Generally, the Board looks to whether a person was actually at work for the employer on the application date. If an employee was not actually working on the application date, then the Board does not ordinarily consider that person in making the determinations required by sections 7(2) and 144(2) of the Act. See *Smith's Construction Arnprior Limited*, [1984] OLRB Rep. March 521 at 522. If an employee was working for the employer at the time the application was made, the Board then decides whether that person was employed within the bargaining unit at that time. The Board in the past had made that determination by examining the nature of the employee's work over a period of time prior to the application that was said to be "representative" of the typical work that the employee in question performed. See *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1983; *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423; *Di-Marco Plumbing and Heating Company Limited*, [1985] OLRB Rep. May 659. More recently, however, the Board has made that determination by having regard principally to the work done by the disputed employee on the application date. See *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 at 44; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 at 225.

In *Delco Contractors*, [1987] OLRB Rep. May 830 the parties agreed that the Board should apply the test set out in *Gilvesy, supra*, to determine whether an employee hired as a carpenter and who performed carpentry work extensively was an employee in the bargaining unit comprised of carpenters for the purposes of an application for certification. On the application date, the employee in question was engaged in chipping of concrete and not carpentry work. Thus, the Board held that as he did not spend the majority of his time on the application date working at the carpentry trade, he was not an employee in a bargaining unit comprised of carpenters.

The Board noted in *Gilvesy, supra*, and *E & E Seegmiller, supra*, that if the evidence was inconclusive with respect to the work performed by the disputed employee on the application date, then any other relevant factor, such as the primary reason for hire, would be considered in determining whether an employee, who was at work on the application date, was employed within the bargaining unit.

Counsel for the respondent argued that the Board should not restrict itself to the application date in determining whether employees working for the respondent were employed in the bargaining unit. In our opinion, the approach taken by the Board in *Gilvesy, supra*, and *Seegmiller, supra*, is consistent with the Board's approach in construction industry applications generally. The circumstances of employment may vary over time, and in the construction industry in particular, employment may change from day to day. Indeed, the policy underlying the Board's approach to holding that in a construction industry certification application, an employee must be actually at work on the application date in order to be counted applies with equal force to determining whether that employee was employed in the bargaining unit.

In an application for certification the Board is making determinations as to whether an employee is in the bargaining unit as of the time an application for certification is made. Even though circumstances may be constantly changing, the Board must examine those circumstances at an instant in time to make the requisite determinations under section 7 and 144 of the Act. Therefore, we are not persuaded that we should depart from the Board's approach in determining whether an employee is in the bargaining unit discussed in *Gilvesy, supra*, and *E & E Seegmiller, supra*."

6. Counsel for the respondent submitted that the Board should apply the "30/30" rule in determining whether employees ought to be included in the bargaining unit for purposes of the count. That argument was made and rejected by the Board in *Colibri Construction Inc.*, [1986] OLRB Rep. July 931 at 933-35:

"... The Board did not deal explicitly with its "30/30" rule and whether, as the respondent argues in submission #1, the rule should have been applied in deciding the number of employees in the bargaining unit. This is because the Board had followed its policy and consistent practice in construction industry certification applications of counting only persons actually at work in the bargaining unit on the application date for deciding the number of employees in the unit. By implication, that policy and practice excludes use of the "30/30" rule.

Where the Board does apply the "30/30" rule in applications for certification, it looks to the fact of employment during the 30 days immediately prior to the application date *and* the 30 days immediately following the application date. Persons who have worked in the bargaining unit sometime during the defined period prior to the application date and the defined period after it, are considered by the Board to be employees for purposes of determining the number of employees in the unit as of the application date. The Board's decision in *Sydenham District Hospital*, [1967] OLRB Rep. May 135 explains the underlying rationale of the rule as having the effect of excluding persons absent during the union's organization campaign and those persons unlikely to return to work, and of allowing the parties to ascertain, in advance of a hearing, which persons will be dealt with by the Board. This rule has been applied by the Board to non-construction applications for certification with a consistency which has established a substantial measure of certainty for the parties in knowing prior to any hearing which persons the Board will find to be in the proposed bargaining unit. The Board has just as consistently not applied the rule to construction industry applications for certification. See, for example, the Board's decision in *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292. The Board applied the "30/30" rule in that case in making a finding that certain persons who are on lay-off when the application was made were not employees in the bargaining unit for purposes of the count. The employer requested the Board to reconsider its finding and, instead, find that they were employees on the grounds that the employer's business was in the construction industry and the Board should have given account to the seasonal nature of the industry. The Board declined to do so. It is clear from the Board's response quoted below that it was the Board's policy at the time to not apply the "30/30" rule in certification applications in the construction industry. Rather, the Board's rule in construction cases was to count only those persons in the employ of the employer on the actual date of application.

'We would mention that it was not suggested by counsel for the respondent that the respondent is an "employer" operating a business in the construction industry as defined in section 90(A) [now section 117(c)] of The Labour Relations Act. In any event, the application was not made under the construction industry sections (sections 90 to 96) [now sections 117 to 151] of The Labour Relations Act. We would point out that if, in fact, the applicant had been entitled to make its application under the construction industry sections of the Act and had done so, the practice of the construction industry division of the Board is to include in the bargaining unit for the purposes of the count only those employees who are in the employ of the employer *on the actual date of the making of the application*.'

[emphasis in original]

The rationale for the rule for construction applications relates to the nature of the employment relationship in the construction industry. See, for example, the Board's decision in *Polmar Tile*

Company, [1970] OLRB Rep. Apr. 50. That is still the Board's rule for applications for certification in the construction industry today and the rule applied by the Board in the instant case in determining that there were three employees in the bargaining unit at the time the applications were made. This rule clearly excludes Mario Lachapelle named in items 3 and 4 of the material facts alleged in the request for reconsideration.

Whereas application of the Board's "30/30" rule in non-construction applications has been the source of certainty for the parties in ascertaining prior to any hearing which employees the Board is likely to include in the bargaining unit sought in the application, in construction industry applications it has been the rule expressed by the emphasized words in the quotation from the Board's decision in *Bertrand & Frere*, *supra*. Some sense of the importance which the Board has attached to certainty in the construction industry applications is gained from a reading of its decision in *Industrial-Mine Installations Limited*, [1968] OLRB Rep. May 217 at paragraphs 9 and 10, a case cited by respondent's solicitor in support of its submissions that the Board should consider the "build-up" factor in the instant application. See also the cases referred to in the dissent to the majority decision in that case, particularly, the quote in paragraph 2 therefrom respecting the Board's decision in *Keystone Contractors Limited*, [1966] OLRB Rep. Feb. 821."

7. It is clear in this case that the persons listed on Schedule "D" were employees of the respondent on the application date, but that they were not working in the bargaining unit at that time. Section 7(1) of the Act requires the Board to determine the number of employees in the bargaining unit as of the time an application for certification is made. The employees listed on Schedule "D" were not employed in the bargaining unit at the time the application was made, but were employed by the respondent elsewhere.

8. In non-construction certification applications, the Board may determine that a person is an employee in a bargaining unit even if that person is not actually at work in the bargaining unit on the application date. Nevertheless, for the reasons set out in *Colibri Construction Inc.*, *supra*, and *Bill Brownlee Excavating*, *supra*, it is not appropriate to do so where, in the circumstances of this case, the employees of the respondent were not at work in the bargaining unit on the application date, but were working elsewhere. See also *New Look Restoration (Ottawa) Limited*, [1988] OLRB Rep. March 316.

9. In this application for certification the applicant filed eight combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 27, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

1078-88-JD International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Complainant v. **Newmarch Mechanical Limited** and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Respondents

Jurisdictional Dispute - Strike - Complainant seeking interim order requiring a redistribution of the work in dispute - Only strike threat involving the complainant - Complainant cannot profit from its own illegal conduct - Board declining to make an interim direction or order

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF THE BOARD; August 5, 1988

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act*. The complainant seeks an interim order requiring a redistribution of the work in dispute. The Board may make such interim orders, pursuant to section 91(8) of the Act which reads as follows:

Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

However, a perusal of the material filed in support of the complaint, reveals that the only strike or strike threat involves the complainant itself and its own members. In other words, the complainant is pleading its own illegal conduct or potential for such illegal conduct, in support of its claim for an interim direction in its favour. In the circumstances, and in the exercise of its discretion, the Board does not consider it appropriate to make any interim direction or order. A complainant under section 91(8) should not be able to profit directly or indirectly from its own unlawful conduct or threat thereof. Our decision in this regard, of course, is made without prejudice to the merits of the jurisdictional dispute claim which will be processed and dealt with in accordance with the Board's usual practice.

1078-88-JD International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Complainant v. **Newmarch Mechanical Limited** and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Respondents

Jurisdictional Dispute - Natural Justice - Practice and Procedure - Reconsideration - Strike - Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice - No necessity for formal hearing - Board having no obligation to consult if pleadings do not disclose a basis for making an interim order - Reconsideration dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF THE BOARD; August 17, 1988

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act*. It was filed on August 5, 1988. The complainant sought an interim order requiring a redistribution of the work in dispute in favour of its members. That work involved the installation of portions of a production line at a General Motors factory. There is no question that such work falls within the ICI sector of the construction industry. Any work stoppage or threatened work stoppage at this time would be illegal. The provision of the Act upon which Local 721 relied reads as follows:

91.-(8) Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

Upon reading the material in support of Local 721's request for an interim order, and in particular paragraphs 6 and 7 where Local 721's members were said to be contemplating "walking out" or had threatened to "down tools", the Board made the following ruling:

However, a perusal of the material filed in support of the complaint, reveals that the only strike or strike threat involves the complainant itself and its own members. In other words, the complainant is pleading its own illegal conduct or potential for such illegal conduct, in support of its claim for an interim direction in its favour. In the circumstances, and in the exercise of its discretion, the Board does not consider it appropriate to make any interim direction or order. A complainant under section 91(8) should not be able to profit directly or indirectly from its own unlawful conduct or threat thereof. Our decision in this regard, of course, is made without prejudice to the merits of the jurisdictional dispute claim which will be processed and dealt with in accordance with the Board's usual practice.

2. By letter dated August 8, 1988 counsel for Local 721 protests this result and the process by which it was reached. Counsel contends that the Board had no jurisdiction to refuse to make an interim order without a formal hearing, or, at the very least, a "consultation" with the interested parties, of the kind contemplated by section 91(8). It is said that the refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice.

3. Section 91 of the Act regulates disputes between two or more unions concerning the assignment of particular work. It empowers the Board to make both interim and final directions with respect to the assignment of such work, based upon such labour relations or collective bargaining criteria as the Board considers appropriate. Section 91(8) in particular is rather unusual. It permits the Board to make an interim direction without the necessity of a formal hearing. However, the authority vested in the Board under section 91(8) is clearly discretionary. There is no obligation to make an interim order, nor, in our view, to consult parties potentially affected if the pleadings of the applicant for such order do not disclose the basis for making one. As the Board observed in *Lummus Canada Inc.*, [1982] OLRB Rep. Sept. 1330:

The Board's jurisprudence on interim orders has, since the inception of what is now section 91, been basically that the assignment of the employer will be continued unless that assignment is patently wrong.

Where the applicant's pleadings, if accepted as true, do not disclose a sufficient basis for making an interim order, we see no reason to schedule a hearing or consultation.

4. In *Bird Construction*, [1984] OLRB Rep. Dec. 1688 the Board held that section 91(8) should be given a liberal interpretation, but also said this:

6. A fundamental principle underlying both mechanisms for voluntary resolution of work assignment disputes and statutory mechanisms for their adjudication is that a party should not gain jurisdiction by threatening or engaging in work stoppages. In other words, striking or threatening a strike to obtain the assignment of work cannot be rewarded as successful behaviour. Thus, if work is obtained by striking, including threatening a strike, the adjudicator will normally restore the situation which existed prior to the strike until the merits of the dispute are determined. That is an understood and accepted fact of life in the construction industry in the United States and Canada. This principle has been the cornerstone of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry as it has been administered by the Impartial Jurisdictional Disputes Board and its predecessor the National Joint Board for the Settlement of Jurisdiction Disputes in the Construction Industry. The elimination of work stoppages as a response to work assignment disputes is a key objective of such voluntary and statutory mechanisms for the resolution of those disputes.

It follows, we think, that a disgruntled trade union, believing itself to be entitled to certain work, should not be able to achieve that objective under section 91(8), by reason of its own unlawful strike or strike threat.

5. In the instant case, Local 721 may well have an arguable claim for the work in dispute, based upon area practice, past agreements, and so on. But, in our view, it cannot base its claim for an interim order under section 91(8) upon its own illegal strike threat, and there is no suggestion that any of the other parties involved in this matter are engaged in or threatening a strike. What we have, then, is Local 721 threatening or indicating that its members will engage in illegal activity unless the Board makes an interim order in its favour. As a matter of public policy we do not think it appropriate to do so, and see no reason why we should vary or amend our decision of August 5, 1988.

6. As before, we wish to emphasize that we make no determination whatsoever about the merits of this complaint, or whether all or some of the work in dispute should be assigned to members of Local 721. We rule only that, in the exercise of our discretion, we are not prepared to make an interim order in favour of Local 721 when the "imminent strike" contemplated by section 91(8) is an illegal one, precipitated by Local 721 itself or its members.

7. For the foregoing reasons, the application for reconsideration is dismissed.

2975-87-R, 2893-87-U International Brotherhood of Electrical Workers, Local 353, Applicant/Complainant v. **P. & M. Electric (1982) Ltd.**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Membership Evidence - Parties advised at hearing that two membership cards did not contain the local number and one had only been signed on the receipt portion - Form 80 disclosing no exceptions - Board not granting leave to file an amended Form 80 declaration given the importance of the document - Two cards without local number not reliable membership evidence - Card containing signature on receipt portion only acceptable - Respondent employer's name on card not required - Form 80 proper given the defects in question - Working foreman found not to be an employee for purposes of the application because he exercises managerial functions - Vote ordered

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *Elizabeth Mitchell*, *Bob Gullins* and *Aldo Didomede* for the applicant/complainant; *Stephen A. McArthur*, *Boyd Pollock*, *Len Boone* and *Jack Braithwaite* for the respondent; no one appeared for the objectors.

DECISION OF THE BOARD; July 14, 1988

1. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* in which the applicant relies upon the provisions of section 8 of the Act, and a complaint pursuant to section 89 of the Act.

2. The Board finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act. Having regard to the agreement of the parties, the Board further finds that all journeymen electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in Board Area No. 8, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. At the first hearing day, before a differently constituted panel of the Board, the parties were advised that two of the membership applications submitted on behalf of the applicant did not contain the name of the applicant, I.B.E.W. Local 353, but referred only to The International Brotherhood of Electrical Workers. The parties were further advised that one of the applications for membership had only been signed in one of the two spaces where an individual applicant was to sign. The Form 80 filed in support of the membership evidence ("Declaration Concerning Membership Documents, Construction Industry") disclosed no exceptions and accordingly did not disclose that two of the memberships did not indicate the Local's name and one was not signed in both places by the employee involved. That panel adjourned the proceeding, prior to embarking upon a consideration of the merits of any aspects of the case.

4. At the subsequent hearing, in front of the instant panel, the applicant sought leave of the Board to file an amended Form 80, with attached membership applications. In the construction industry, applicant unions are required to file a Form 80, which form is the equivalent form, in text and purpose, to Form 9 for non-construction certification applications. Form 80, in paragraph three therein, reads as follows:

3. (Where the documentary evidence consists in part of receipts or other acknowledge-

ments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

5. In *Pebrá Peterborough Inc.*, [1988] OLRB Rep. Jan. 76, the Board at some length discussed the purpose and effect of requiring the filing of a proper Form 9, which analysis applies equally to the purposes of requiring a Form 80 to be filed. As the Board stated in that case:

43. As the Board noted in *Grand and Toy Limited*, *supra*, and in numerous other cases, the Form 9 Declaration is considered so important by the Board that if one is not filed, the Board will give no weight to the union's membership evidence and the application will be dismissed. Consistent with this principle, if a Form 9 Declaration is filed but the Board determines that it is not a proper Form 9 Declaration, then the Board will also give no weight to the union's membership evidence and will reject the application. For membership evidence to be acceptable, it must not only contain the requisite elements and be filed by the terminal date, but must be supported by a proper Form 9. A Form 9 will be improper when the Board concludes that the declarant either did not possess the requisite personal knowledge to sign the form, or did not engage in the necessary reasonable inquiries as a prerequisite to signing the form. The Form 9 will also be improper if the declarant knew, or ought to have known, either that certain matters ought to be [sic] have been disclosed, but were not, or that some of the disclosures constitute material misrepresentations. At the same time, there may be circumstances where the Form 9 is subsequently determined to be inaccurate, but nevertheless remains proper; for example, the Board is satisfied that the declarant made reasonable inquiries but those inquiries did not disclose exceptions or problems with the membership evidence and accordingly the declaration does not note such exceptions. In this latter circumstance, the declaration itself would be proper (though inaccurate) in that the declarant made the necessary inquiries and disclosed what the declarant knew or ought to have known. Any misinformation or lack of information provided by the person of whom inquiries were made in such a circumstance would not reflect upon the sufficiency or propriety of the Form 9 itself, and accordingly *viva voce* evidence might well satisfy the Board that the membership evidence in question is reliable. Again, such *viva voce* evidence is only admissible in certain circumstances: see paragraph 28, *supra*. But where no Form 9 is filed, or having been filed is found not to be proper in the sense that inquiries were not made, or exceptions or matters that should have been noted are not noted or inaccurately noted, the membership evidence will not be properly attested to as required by the regulations, and the membership evidence will be given no weight.

44. Quite apart from the fact that Rule 6 requires such a Form 9 to be filed, fairness to the parties and the integrity of the process demands such a Board response when a proper Form 9 is not filed. It is not a question of punishing the transgressing party, but of ensuring that both the Board and the parties have confidence in the integrity and fairness of the system and the certification process. Any such confidence would be seriously undermined if the Board were to conclude that a Form 9 was improper in one of the respects noted above, but nevertheless were to rely upon the *viva voce* evidence to find that the membership evidence was adequate and reliable. Were the Board to do so, there would be little incentive for Form 9 declarants to file proper Form 9's or make the necessary inquiries, since at worst an intentionally misleading or negligently inaccurate Form 9 would lead to the Board conducting its own inquiry, and at best, the Board might never discover the problems with the membership evidence. The requirement under the Rules that a Form 9 be filed, and the Board's insistence that it be a proper Form 9, provides the necessary deterrent to such potential abuse.

6. Given the importance of a proper Form 80 Declaration being filed, the Board concluded it was not appropriate to allow an amended Form 80 to be filed. The applicant sought leave to file the amended Form only after the first hearing day, at which time potential problems with

three membership applications had been disclosed to the parties by the Board itself. To allow the applicant union to file an amended Form 80 subsequent to such disclosure by the Board and subsequent to the initial hearing day would undermine the purpose of requiring that the Form be filed, and would potentially impair the integrity and fairness of the system. To sanction such late filing would be to provide an applicant union with an opportunity to repair its case after concerns or objections had been communicated to it. There would be little incentive for a Form 80 declarant to make reasonable inquiries or to file a proper Form 80 were the Board to allow amended forms to be filed when problems with membership evidence were raised in the hearing. The Board relies on the Form to disclose to the Board and participants in the proceeding those matters described in paragraph 3 of the Form, matters which generally involve disclosing potential defects with the membership evidence not apparent on the face thereof. The Form also serves as an additional verification that the individual applicant for membership has indeed so applied and has paid, where so indicated, the appropriate amount of money in support of the application for membership. For the Form to have efficacy as a verification of the sufficiency of the membership evidence, declarants must understand and accept the obligations required by the filing of the Form. To allow subsequent filing, only after potential problems are raised by other parties or the Board, would subvert this purpose. For these reasons the Board would not allow the filing of the amended Form 80.

7. With respect to the sufficiency of the Form 80 and with respect to whether any of the three membership applications in question could be relied upon by the Board, the Board heard the evidence of Robert Gullins, the Form 80 declarant and the individual who had collected all of the filed membership applications. Gullins testified with respect to the circumstances in which he had signed the Form 80, and with respect to the signing and collection of the two applications for membership which did not indicate the name of the applicant union on them. He gave no evidence with respect to the card on which the employee had only signed once. There was no objection to Gullins testifying with respect to these matters. The Board ruled orally that it would not rely on the two cards which did not indicate the applicant's name, but that it would rely upon the card on which the individual applicant for membership had only signed in one of the applicable spaces. The Board further ruled that in the circumstances there was nothing improper with the Form 80 as filed, and accordingly the Board was prepared to rely upon all the remaining membership evidence.

8. Absent any objection, from the parties, the Board entertained Gullins' evidence, but we were not prepared to give it any weight with respect to the sufficiency or reliability of the two cards on which the name of the applicant was missing. Evidence with respect to the substantive aspects of applications for membership can only be relied upon by the Board if submitted in documentary form and so submitted by the terminal date: see for example, *P.R.C. Chemical Corporation of Canada Limited*, [1980] OLRB Rep. May 749; *Maple Leaf Mills Limited*, [1984] OLRB Rep. Oct. 1474, at Paragraph 9; *Colautti Construction Ltd.*, [1985] OLRB Rep. May 643; and *Pebra Peterborough Inc.* (supra). Whether an individual employee has in fact applied for membership and whether that application is with respect to the applicant union are substantive aspects of membership and *viva voce* evidence will not be referred to by the Board in assessing these matters. Accordingly, the Board considered the reliability of the three cards only with reference to the cards themselves.

9. The Applications for Membership filed by the applicant read (in blank) as follows:

APPLICATION FOR MEMBERSHIP

No.

DATE _____

I hereby apply for membership in the International Brotherhood of Electrical Workers Local

Union ("the union") and agree to abide by the bylaws of the union and the Constitution of the International Brotherhood of Electrical Workers. I authorize the union to be my exclusive bargaining agent in all matters pertaining to rates of wages, hours of work and any other condition of my employment.

signature of witness

signature of applicant

PLEASE PRINT THE FOLLOWING IN BLOCK LETTERS:

Name

Phone

Address

City

Employer

Employer's Address

I hereby acknowledge and certify that I have paid the amount shown below on account of the initiation fee for membership in the union.

Amount _____/100 Dollars

Signature of Applicant _____

Signature of actual collector of above money _____

10. Two of the applications for membership were regular in other respects except that in the space in the first paragraph for inserting the number of the local union, that space remained empty. On the third application for membership in question, although "353" was written in that space, in the space immediately below the first paragraph where there is a space for the "signature of applicant", that space remained blank. However, at the bottom of the application in question, where the card reads "I hereby acknowledge and certify that I have paid the amount shown below on account of the initiation fee for membership in the union", the individual employee in question had signed in the appropriate space. In other words, this particular application for membership had been signed by the individual employee, but only in the second spot where there was a space for the employee to sign, and not immediately below the paragraph at the top of the card, which paragraph reads, in part, "I hereby apply for membership in the International Brotherhood of Electrical Workers Local Union 353..."

11. With respect to this latter card, the Board was satisfied that the employee had intended to so apply and had in fact applied for membership. It is clear that the card deals with an application for membership in the applicant local union. The particular part of the card which the employee had signed indicates that the employee is acknowledging and certifying that he has paid the amount shown "on account of the initiation fee *for membership in the union*" (emphasis added). Although the employee did not sign immediately below the text indicating "I hereby apply for membership...", when the card is read in its entirety, with its heading "Application for Membership", and the particular signed attestation that the employee acknowledged and certified that he paid the initiation fee "for membership in the union", the Board was satisfied that the card did reflect the individual's application for membership.

12. With respect to the two cards which did not set out the name of the applicant, in that they did not identify the number of the local, the Board rejected those two cards. It was not apparent from the face of the cards that the individual applicants for membership had been applying for membership in the particular applicant union, Local 353. As the cards did not unequivocally indicate that the employees in question were applying for membership in the applicant union, Local 353, the Board was not prepared to give any weight to their cards and they were accordingly rejected.

13. The respondent also argued that the cards were deficient when they did not have the employer's name set out in the appropriate space. The Board did not reject any of the cards for this reason, as the cards are applications for membership in a bargaining agent, and not with respect to a particular employer. Such information is not required on applications for membership. The respondent also argued that at least one of the cards was insufficient in that Gullins had testified that he had signed as a witness before the individual employee had signed. We are prepared to assume for this proceeding that the signature of the individual applicant must be witnessed. Having regard to Gullins' *viva voce* evidence, and having found him credible, we are satisfied that Gullins had in fact witnessed the signatures in question, though he might have signed a particular card or cards as witness prior to the individual employee affixing his signature. That he might so have signed did not detract from the fact that the Board was satisfied he had in fact witnessed the signatures in question.

14. Given the particular defects in question, the Board was satisfied that the Form 80 filed was proper. Looking to the actual wording of Form 80 and more particularly paragraph three therein (set out above), no disclosure is required with respect to the names of locals missing or with respect to a signature of an employee missing on a particular card. The purpose of Form 80 (or Form 9 for that matter) is, as the quote from *Pebra Peterborough Inc.* indicated, to ensure the integrity of the process. As noted, it accomplishes this both by pointing out problems which are not apparent on the face of the membership evidence, and by providing additional verification, from someone other than the individual applicant for membership, that the membership documents, though of a hearsay nature, can be relied upon by the Board. Apart from the fact that the literal wording of Form 80 does not require disclosure of the problems encountered in the instant case, the integrity and fairness of the system is in no way undermined by the failure to disclose apparent gaps or missing signatures or information. In the instant case, the integrity of the system was protected by the Board reviewing the membership evidence to ensure that there were no problems apparent on the face thereof.

15. Having disposed of the membership evidence and Form 80 concerns, the Board began hearing the merits of the section 8 and 89 allegations. Prior to the completion of the hearings with respect to these matters, the parties were able to reach a settlement with respect to most matters, and they filed the following Minutes of Settlement:

Board File No. 2975-87-R and 2893-87-U

B E T W E E N:

THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 353
("THE UNION")

Applicant/Complainant

- and -

P. & M. (1982) ELECTRIC LTD.

Respondent

MINUTES OF SETTLEMENT

WHEREAS the Union has filed an application for certification in OLRB File No. 2975-87-R and has filed a Complaint of an Unfair Labour Practice in OLRB File No. 2983-87-U;

AND WHEREAS the Board has held two days of hearing in these matters and continuation dates have been set;

AND WHEREAS the parties now wish to settle the matters in dispute between them;

THE PARTIES HEREBY AGREE:

1. That the Respondent will pay damages to the following grievors:

- (i) Doug Herd - one week's wages;
- (ii) Aldo Dididomedé - two week's wages;
- (iii) Tom McAllese - two day's wages;
- (iv) Angelo Bazzo - two week's wages;
- (v) Mark Schipper - two week's wages.

The damages are to be calculated based on the amount of money being earned by the employee at the date of his termination from employment with the Respondent;

2. The damages as calculated in paragraph 1 are to be paid to the individual employees by cheques which are to be given to the Union for distribution to the individual employees within one week of the date of the signing of these Minutes of Settlement;

3. The Respondent agrees to reinstate in Board Area 8 Aldo Dididomedé ("Dididomedé") and Mark Schipper ("Schipper") as journeymen electricians and Angelo Bazzo ("Bazzo") as an apprentice electrician. Within one week of the signing of these Minutes of Settlement, the Union shall notify the Respondent of the actual date of the return to employment of these three employees;

4. The Respondent agrees to allow access to its job sites in Board Area 8 to two representative of the Union, as selected unilaterally by the Union, under the terms set out herein. The Respondent agrees that the Union may hold one meeting to a maximum of 45 minutes during each of the two weeks immediately preceding the vote at named locations. The specific time and place of each meeting is to be agreed upon but the meetings shall be held during normal working hours. The Respondent agrees to inform the employees of the time and place of each meeting, to advise them that their attendance is expected and to shut down the Respondent's work during the meetings.

5. The parties agree that the voters' list will be composed of those employees doing bargaining unit work who are at work in Board Area 8 on the date that the vote is ordered by the Board and are still at work on the date the vote is held, with the exception of the reinstated employees Bazzo, Dididomedé and Schipper who are entitled to vote provided that they have begun work for the Respondent prior to the vote and are at work on the date of the vote;

6. The Respondent agrees to post at each of its job sites the "Notice to Employees" which is attached as Schedule "A" to these Minutes of Settlement. These Notices are to remain posted from the date of the issuance of the Board decision incorporating these Minutes of Settlement until one week following the date of the vote;

7. The Respondent agrees that the terms and conditions, rights, duties and privileges of employment are to remain unchanged as from June 30, 1988, unless the Respondent has the express agreement of the Union to a change;

8. The parties agree to request that the Board schedule the holding of the vote within 3 weeks of the date on which it issues its decision incorporating these Minutes of Settlement;

9. The Union hereby agrees to a vote among the employees of the Respondent to determine the issue of whether they wish to be represented by the Union and to withdraw its applications for automatic certification and the unfair labour practice complaint;

10. The parties agree to request that the Board incorporate these Minutes of Settlement into a Consent Order of the Board.

SIGNED AT TORONTO this day of July, 1988.

Union

Respondent

(SCHEDULE "A" NOT SET OUT HERE)

16. Counsel for both parties indicated to the Board at the hearing that although the copy of the Minutes filed with the Board had not been signed, the Minutes did in fact reflect the agreement of the parties.

17. Having regard to the Minutes of Settlement and the further submissions of counsel at the hearing, the Board issued at the hearing on July 5, 1988 the following directions and orders:

- a) Within one week of July 5, 1988, the Respondent is directed to pay to those individuals named in paragraph one of the Minutes, the amount of wages therein described, by way of damages.
- b) The respondent is directed to reinstate forthwith, to employment in Board Area 8, those individuals named in paragraph three of the Minutes, to the positions so described in that paragraph. If those individuals are otherwise employed prior to reinstatement, the normal principles of mitigation will apply.
- c) The respondent is directed to provide access as described in paragraph four of the Minutes.
- d) As the Board is satisfied on the basis of all the evidence before it that more than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act, the Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit. Subject to our decision below with respect to Doucet and Della Ventura, those entitled to vote will be as described in paragraph five of the Minutes.
- e) The respondent is directed to post a "Notice to Employees" as described in paragraph six of the Minutes such posting to be effective beginning July 6, 1988.
- f) The complaint pursuant to section 89 of the Act (Board File No. 2893-87-U) is hereby withdrawn with leave.

18. Subsequent to the filing of these Minutes and the issuance of the Board directions as set out immediately above, the parties were able to agree that an individual previously challenged by the union, Ralph Doucet, ought to be excluded from the bargaining unit. The respondent specifically declined to agree that this exclusion was because he exercised managerial functions within the

meaning of section 1(3)(b) of the Act. Having regard to the agreed exclusion of this individual, Doucet will not be eligible to vote.

19. Salvatore Della Ventura was also challenged by the union as exercising managerial functions within the meaning of the Act. A Board officer had previously been appointed with respect to this issue and his Report was before the Board. After entertaining the submissions of the parties, a majority of the Board (Board member Sloan reserving his decision) ruled that Della Ventura did exercise managerial duties and responsibilities within the meaning of section 1(3)(b) of the Act, and accordingly was not an "employee" for purposes of the Act and would therefore be excluded from the bargaining unit. Board member Sloan is now in agreement with this ruling and the Board's decision in this regard is unanimous.

20. We do not intend to recite the evidence, which is set out in full in the Officer's Report, nor the numerous cases referred to by the parties. Although Della Ventura could be described as a working foreman, in that he regularly and routinely performed bargaining unit work along side bargaining unit employees, he also exercised managerial functions. He was primarily responsible for supervising the Toronto area job sites of the respondent. Della Ventura would visit the various job sites, in order to see that the work was progressing properly and that employees were properly performing their work. Two to three times a week he would switch job sites and he would stay at a particular site for varying lengths of time, at his discretion. While on a particular job site he would supervise and direct the crew, correcting mistakes and assigning work to employees and additionally would perform the work himself where he felt it was required. This might well involve working an entire day at bargaining unit work. At the same time, however, he had some limited input into hiring, and provided assessments of the employees to management. He also had significant input into firing, where the occasion arose, in that he would send back to the shop an employee whose services he was not happy with, and would refuse to have that employee on his crew in the future. A significant factor was that Della Ventura himself exercised the discretion, where required, to decide which employees would be sent back to the shop when there was not enough work for all employees on the project. Although the project itself would continue, Della Ventura decided which employees would continue to work on it, and which employees had to return to the shop and hope that there was sufficient work on other projects for them to remain employed. In this respect, Della Ventura was making decisions which had a significant and direct effect on the economic livelihood of the employees on his crews. When his duties and responsibilities were viewed in their entirety, it was more accurate to describe Della Ventura as the person responsible for supervising and managing all the Toronto work sites of the respondent, notwithstanding that he also performed bargaining unit work. This supervision and management included decision making with respect to which employees would be laid off, at least from the job sites under his control. For all these reasons, the Board concluded that Della Ventura exercised managerial functions within the meaning of section 1(3)(b) of the Act.

21. All other matters having been settled, and a representation vote having been directed, the balance of the hearing dates set for this proceeding are hereby cancelled.

22. This matter is referred to the Registrar.

0477-88-R Wilfrid Laurier University Faculty Association, Applicant v. Wilfrid Laurier University, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Trade Union Status - Applicant had existed as an association representing full-time faculty since the 1950's - Constitution amended in 1970's to make reference to academic personnel and to set up two categories of members - Motion to admit librarians to membership made after application date - Board finding that applicant a trade union - Applicant's capacity to represent professional librarians going not to trade union status but the question of whether the applicant should be certified to represent a unit which includes professional librarians - Reference to academic personnel in constitution sufficiently broad to permit applicant to represent librarians - Nothing in bylaws requiring discriminatory treatment of two categories of membership - Board officer appointed to inquire into community of interest between librarians and faculty

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *M. Rozenberg* and *H. Peacock*.

APPEARANCES: *Michael Mitchell, Tanya Lee, Jim Harkins* and *Michael Moore* for the applicant; *C. G. Riggs, Russell Muncaster* and *Erich Schultz* for the respondent; *Theresa McClenaghan* for the objectors.

DECISION OF THE BOARD; August 17, 1988

1. This is an application for certification dated May 20, 1988 in which the applicant was notified by the Registrar that its status as a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* would have to be proved. The terminal date set in this application was June 3, 1988 and the hearing date June 17, 1988.

2. The applicant called two witnesses, S. Stack and M. Moore, with respect to the issue of trade union status. Having weighed and assessed that testimony in the context of the usual factors going to credibility, the documentary material filed and what is reasonably probable in the circumstances, the Board makes the following findings of fact.

3. The applicant has existed as an Association representing the full-time faculty of the respondent since the 1950's. Its original constitution dated from 1957 and was amended in 1964, 1968, 1970 and twice in 1976. The constitution currently in effect was approved April 30, 1978. Clauses 2.1 and 3.1 of that document read:

Purpose

2.1 The purpose of this Association shall be to negotiate and regulate employment relations of the academic personnel of the university and to promote their welfare as a community of scholars.

Membership

3.1 Membership in the Association shall be open to all full-time employees of Wilfrid Laurier University whose responsibilities are primarily academic rather than administrative, and to those whom the Association from time to time deem eligible.

The bylaws presently in force were approved in 1977. It is appropriate to set out clause 1.1 of those bylaws.

Membership

1.1 There shall be two categories of members, Regular and Associate.

1.11 Regular Members:

Any employee of the University whose responsibilities are primarily academic rather than administrative and whose contract is governed by the Faculty Manual shall be eligible for Regular Membership in the Association.

1.12 Associate Members:

The Executive shall recommend to the general membership individuals for Associate Member status and shall specify the rights and obligations of such members.

4. It is also useful to note that the name of the respondent has changed over the years from The Waterloo College to The Waterloo Lutheran University to its present name, Wilfrid Laurier University. The name of the Association reflected those changes. In 1976, a proposed amendment to adopt the name the Wilfrid Laurier University Academic Personnel Association was defeated and the name of the applicant remained the Wilfrid Laurier University Faculty Association. In contrast, the other proposed amendments, including clause 2.1 (purpose) to refer to "academic personnel" rather than "teaching staff", were approved at that time. This change in language was intended to enable the Association to represent a broader category of persons than full-time teaching staff and, in particular, the Association had in mind professional librarians and those teaching physical education courses and/or coaching in that department.

5. The Association has traditionally represented full-time faculty whose contract was governed by the Faculty Manual. The Faculty Manual is referred to and incorporated into the contract of employment. Since 1969, senior administrators, such as the President, Vice-Presidents and Deans, have been excluded on the basis that their duties are primarily administrative rather than academic. While the chief librarian had been a member of the Association, in 1976, the Association Executive decided that the chief librarian should be excluded for the same reasons as other senior administrators. Apart from this, professional librarians traditionally have not been represented by the Association. In the mid-1970's, the Association did consider admitting professional librarians to membership in response to a general request to the Canadian Association of University Teachers (CAUT) affiliates (including the Association) to so consider professional librarians and in response to inquiries from one or two interested librarians. That matter was not pursued, however, because the Association Executive concluded that the University administration was unlikely to recognize the Association as the representative of the professional librarians as the administration had taken the position that the Association could not represent persons teaching and coaching in the physical education department as those individuals were not formally classified as full-time faculty, i.e., those whose contract was governed by the Faculty Manual. Thus, while the bylaws provided for Regular Members and Associate Members from 1977 onwards, no Associate Members were ever admitted to the Association.

6. In early 1988, the possibility of certification of the applicant was general knowledge on campus. Informal invitations from the professional librarians led to more formal discussions with the Association Executive. At the May 6, 1988 general membership meeting, the following is recorded in the Minutes:

2.2. Librarian Meeting:

Barry Gough reported on a meeting of the Executive Committee with the professional staff in the library which the latter had requested. He indicated significant support among the full-time

professional employees in the library for certification along with the faculty. If the definition of a bargaining unit includes librarians, the constitutional definition of membership in the Faculty Association would be automatically amended.

At the hearing, Moore testified that the last sentence just quoted did not represent the view of the Association or the Executive. At its meeting on May 19, the Executive decided to bring a formal motion admitting professional librarians to membership in the Association to the next general membership meeting. The Minutes of the Executive Committee state that “the Executive determined that the bargaining unit for the certified Association will include full-time faculty and professional librarians.” That general membership meeting was held on May 26; the relevant excerpt from the Minutes reads:

4. Report on Librarians

MOTION (Barry Gough/Michael Moore): that this association admits WLU professional librarians other than the Head Librarian as Associate Members, and does so under the terms of the WLUFA Constitution, and empowers the Executive to work out the precise details of the arrangement with those in question.

CARRIED.

Moore also testified that, at the meeting, it was expressly specified, although not recorded, that the rights and privileges of Associate Members were the same as those of Regular Members. The “precise details” which remained to be finalized referred only to the calculation of dues. That is, the Association dues for a full-time faculty reflect the various academic ranks, such as the Assistant Professor, Associate Professor and Full Professor. At the time, the Association was not aware of the formal ranking of professional librarians, if any, and, hence, could not finalize the quantum of dues to be paid by Associate Members.

7. Counsel for the applicant briefly reviewed the constitutional history and bylaws in support of his assertion that the applicant constituted a trade union within the meaning of the Act. Counsel asserted it could not reasonably be suggested that the applicant was not a trade union entitled to represent full-time faculty. With respect to the issue of professional librarians, it was contended that the question went to whether the applicant could be certified to represent librarians rather than trade union status. And, in any event, counsel argued that the evidence warranted a conclusion that librarians could be, and were, properly admitted to membership in the applicant and, thus, the Association could represent those persons. Counsel also distinguished between the application date as the date on which the applicant must be a trade union within the meaning of section 1(1)(p) and a later point in time (i.e., the terminal date or the date of the hearing) by which the applicant must be able to admit as members those persons whom it seeks to represent. Even if the appropriate date for admission to membership was the application date, it was asserted that the Executive recommendation (on May 19) was sufficient to satisfy this concern. Counsel referred to: *Buckley Cartage Limited*, [1964] OLRB Rep., Jan. 593; *Playtex Limited (Arnprior)*, [1959] OLRB Rep. Dec. 316; *The Hamilton and District School of Nursing*, [1968] OLRB Rep. Jan. 960; *Verafood Services Limited*, [1967] OLRB Rep. Sept. 539. In reply, it was submitted that the applicant had the capacity, from 1976 onwards, to admit others. Moreover, the Association’s own interpretation of those constitutional documents should govern rather than a narrow reading, particularly given the Act’s acceptance of a practice of admitting certain categories of persons as sufficient notwithstanding the express provisions of the constitution. Finally, it was argued that the policy concerns (i.e., the potential of closed shop provisions) underlying the requirement that persons whom an applicant seeks to represent must be able to be admitted to membership were not applicable here.

8. Counsel for the employee objectors did not assert the applicant was not a trade union entitled to represent full-time faculty. However it was submitted that the applicant did not have trade union status to represent professional librarians. That is, counsel asserted that the critical date was the application date and, as of that point, the general membership had not approved the admission of professional librarians into membership. Moreover, it was contended that the procedure followed subsequent to the applicant date itself was defective in that the professional librarians were not admitted to membership as individuals by name nor were the rights and obligations sufficiently specified. That is, counsel argued that the professional librarians were still not admitted as members in accordance with the applicant's constitution.

9. Counsel for the respondent, as well, did not assert that the applicant lacked status as a trade union with respect to an entitlement to represent full-time faculty. Counsel reviewed the constitutional documents and asserted that those documents still precluded the admission of professional librarians to membership. That is, the absence of a specific prohibition against professional librarians and the presence of an "open-ended" category of membership was insufficient; rather, an amendment to the bylaws, at least, was needed. Further, it was contended that constitutional documents should be interpreted strictly. In this case, the failure to specify in detail and in writing the "rights and obligations" of the professional librarians purportedly admitted as a Associate Members was fatal. Counsel contended that the appropriate date for the Board's assessment was the application date and, given the language of the documents and the history of the Association, the applicant was not entitled to represent professional librarians.

10. The statutory definition of a trade union in the Act requires an applicant seeking to prove its status establish that it is an organization of employees formed for purposes which include the regulation of relations between employees and employers. Specifically, the applicant must prove it is a viable organization with officers elected in accordance with its constitution. A useful summary of the requisite process is set out in Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (Butterworths, 1985) at page 130:

The Board has said that the following steps should be taken to form a *bona fide* trade union: (1) a constitution should be drafted setting out, among other things, the purposes of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings; (2) the constitution should be placed before a meeting of employees for approval; (3) the employees attending such meeting should be admitted to membership or, if they have joined before, should be confirmed as members; (4) the constitution should be adopted or ratified by vote of the said members; (5) officers should be elected pursuant to the constitution.

(See: *Local 199 U.A.W. Building Corp.*, [1977] OLRB Rep. July 472; *E.B. Eddy Forest Products Ltd.*, [1977] OLRB Rep. Oct. 694; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; *Canteen of Canada Ltd.*, [1978] OLRB Rep. Sept. 802; *Brant County Board of Education*, [1979] OLRB Rep. Feb. 70; *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498; *National Steel Car Corp. Ltd.*, [1979] OLRB Rep. June 542; *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889; *Cambridge Motor Hotel*, [1980] OLRB Rep. Dec. 1725; *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. June 763.) See also *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889; *University of Ottawa*, [1975] OLRB Rep. Sept. 694 wherein the Board looked to evidence of continuous functioning of an organization under subsequent amendments to its original constitution in concluding a constitution existed at the organization's inception. In this instance, given the considerable history of the applicant as an organization operating in accordance with a constitution and representing full-time faculty, there is no question that those factors have been satisfied. Indeed, neither the respondent nor employee objectors asserted otherwise. Moreover, the Board has no jurisdiction to create standards for determining trade union status beyond those set out in section 1(1)(p) itself, i.e. to refuse to find trade union status where the

constitutional provisions of the applicant might be discriminatory, apart from the relevance of those provisions to the issues of viability, purpose, etc.: *CSAO National (Inc.) v. Oakville Trafalgar Memorial Hospital Assoc. and Ontario Labour Relations Board* (1972), 26 D.L.R. (3d) 63, 72 CLLC 26 14,118 (Ont. C.A.); revg. (1971), 23 D.L.R. (3d) 649 (Ont. H.C.); affg. [1971] OLRB Rep. Feb. 70. Accordingly, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

11. The respondent and employee objectors, however, assert that the applicant lacks the capacity, or has not properly exercised its capacity, to represent professional librarians. In the Board's view, this assertion goes not to trade union status but to the question of whether the applicant should be certified to represent a bargaining unit which includes professional librarians (should such a unit be found appropriate). The Board has traditionally refused to certify a trade union as bargaining agent where that union's constitution renders ineligible for membership at least some of the persons whom the union will be required to represent if certified: *G.K.L. Industries Ltd.*, [1985] OLRB Rep. Oct. 1464. This policy is grounded on the potential consequences for such employees should the trade union negotiate a collective agreement which required membership in that organization as a condition of employment: quite simply, those persons ineligible for membership could have their employment terminated. In determining this issue in the instant application, the Board must examine the constitution and bylaws of the applicant and, alternatively, given section 103(4) of the Act, its history of membership. To deal with the latter aspect first, it is acknowledged that the applicant has not traditionally admitted professional librarians to membership. The relevant excerpt from the current constitution and bylaws have been reproduced in paragraph 3 above and need not be repeated here. In the Board's opinion, the change in language in Article 2.1 of the constitution to refer to "academic personnel" clearly broadens the groups of persons which the organization could represent and was enacted specifically with reference to professional librarians, *inter alia*, who ostensibly would not have fallen within the earlier reference to "teaching staff". That the bylaws established two categories of members, "Regular" and "Associate", does not derogate from the entitlement of the applicant to represent professional librarians. Nor does the reference in 1.12 of the bylaws to "individuals" preclude, of itself, the establishment of rights and obligations of a category of persons as Associate Members. There is nothing on the face of the bylaws which requires discriminatory treatment of the two categories of membership. The Board should not, without more, transform a potential for discrimination in the future into a bar to certification. [Moreover, the evidence suggests there is no existing discrimination and none intended in the future: see *infra* at par. 12]. While the prudent course might suggest recording such rights and obligations in writing, the Board is not prepared to characterize the absence of such a written record as a fundamental defect prohibiting the applicant from representing professional librarians. It should be noted that, while the references throughout have been to professional librarians for ease of exposition, the reference is intended to embrace the library systems manager as well. Thus, the Board finds that the applicant has the capacity to represent professional librarians. Certification would not be refused in respect of a bargaining unit which included professional librarians on the basis asserted by the respondent and intervener.

12. The dates on which the Executive Committee meeting and general membership meetings were held which ultimately resulted in the admission of individual professional librarians to membership as Associate Members with all the rights of Regular Members are irrelevant, for the foregoing reasons, to the issue of trade union status and to the capacity of the applicant, given its constitution and bylaws, to represent persons in that category. The Board also notes that, while the analysis has referred to the "potential" for discriminatory treatment amongst members, the evidence (while irrelevant to the issues just mentioned) indicates that Associate Members are not discriminated against. That the details of the dues level remain to be finalized is of no consequence to this Board in the circumstances (see paragraph 6 above).

13. The Board stresses that the above comments are made in the context of a partial agreement with respect to the bargaining unit description. The parties remain in dispute, as set out *infra* at paragraphs 15 and 16. Thus, the finding of trade union status within the meaning of section 1(1)(p) of the Act and the Board's conclusion that the applicant possesses the capacity to represent professional librarians does not resolve the question as to whether the appropriate bargaining unit should, in the circumstances, include professional librarians. As noted *infra*, a Board Officer is appointed to inquire into the community of interest aspect.

14. The parties were in partial agreement with respect to the bargaining unit as follows:

all full-time faculty employed by the respondent in the Regional Municipality of Waterloo, save and except the President, Vice-Presidents, Deans, Director of Computing Services.

Clarity Note:

For purposes of clarity, the parties agree that persons holding visiting appointments for one (1) year or less are not included in the bargaining unit.

15. The parties remained in dispute with respect to the professional librarians, library systems manager, University librarian and in-residence appointments. It is the applicant's position that the professional librarians and library systems manager should be included in the bargaining unit on the basis that those persons share a community of interest with the full-time faculty. The respondent and the intervener disagree. All parties agree that the Board's determination of this issue would resolve the question of the University librarian. That is, if the applicant's position is upheld, the University librarian should be specifically excluded from the bargaining unit as managerial by virtue of section 1(3)(b) of the Act; otherwise, the University librarian need not be noted in the bargaining unit description. With respect to the professional librarians, the applicant also asserts that "library heads" should be included in the bargaining unit. Conversely, the respondent contends that library heads should be excluded because they do not share a community of interest with the full-time faculty and, in the alternative, that the library heads are managerial within the meaning of section 1(3)(b) of the Act. The intervener concurs with the respondent's latter ground for excluding library heads. It is useful at this point to note the names of the persons challenged: Herb Schwartz, Library Systems Manager; Joan Mitchell, John Arndt, Richard Woeller, Diane Wilkins, Brooke Skelton, H. Parkinson, library heads.

16. Finally, the parties disagreed as to the inclusion or exclusion of in-residence appointments. The applicant contended that those persons share a community of interest with full-time faculty and, therefore, should be included in the bargaining unit. The respondent disagreed. The intervener took no position on this question.

17. The Board hereby appoints a Board Officer to inquire into and report back to the Board as follows:

- (i) on the community of interest between the professional librarians and library systems manager, on the one hand and full-time faculty, on the other;
- (ii) on the community of interest between the library heads and full-time faculty and, as well, on the duties and responsibilities of the library heads, namely, Joan Mitchell, John Arndt, Richard Woeller, Diane Wilkins, Brooke Skelton and H. Parkinson;

- (iii) on a community of interest between the in-residence appointments and the full-time faculty.

18. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision concerning the inclusion or exclusion of the above-mentioned classifications and persons. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 3, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Specifically, of the 259 persons in the bargaining unit (including the persons challenged), the applicant filed membership cards in respect of 163. Further, the membership evidence was in the proper form and supported by a Form 9 Declaration filed with the Board attesting to the authenticity of the membership evidence.

19. The Board also notes that a statement of desire in opposition to the applicant was filed with the Board including the names of 13 persons who had previously signed membership cards. However, the Board need not deal further with the statement of desire because, even if voluntary, it does not raise doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, so that the Board generally would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time. This is so regardless of the Board's ultimate decision concerning the inclusion or exclusion of the earlier-noted matters remaining in dispute between the parties.

20. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, certifies the applicant as bargaining agent for all full-time faculty employed by the respondent in the Regional Municipality of Waterloo, save and except the President, Vice-Presidents, Deans, Director of Computing Services and, pending the final determination of the matters in dispute, excluding as well professional librarians, library systems manager, university librarian, library heads and in-residence appointments. In this regard, the Board adds the clarity note agreed to by the parties: for purposes of clarity, the parties agree that persons holding visiting appointments for one (1) year or less are not included in the bargaining unit.

21. A formal certificate must await the final determination of the bargaining unit.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2000-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pry-Con Construction Inc. (Respondent) v. Labourers' International Union of North America, Local 493 (Intervener)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building and the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2590-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Peter Kiewit Sons Co. Ltd. (Respondent) v. Employee (Objector)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2792-87-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Phase IV (Four) Electrical Contractors Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3173-87-R: Canadian Union of Public Employees (Applicant) v. 672067 Ontario Inc. c.o.b. as Rothwell Heights Lodge (Respondent)

Unit: "all employees of the respondent in the City of Gloucester, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

0165-88-R: United Food & Commercial Workers International Union (Applicant) v. Welland Youth Group Home & Housing Programme Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #2: "all employees of the respondent in its Niagara Residential Centre Programme in the Regional Municipality of Niagara, save and except case management co-ordinator, persons above the rank of case management co-ordinator, office and clerical staff, students employed during the school vacation period and per-

sons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

0449-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of the respondent engaged in cleaning and maintenance at 500 Murray Ross Parkway in Downsview, including resident superintendents, save and except property manager, persons above the rank of rank of property manager" (3 employees in unit)

0458-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. 502858 Ontario Ltd. (Respondent)

Unit: "all dependent contractors in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, dispatch staff, and clerical staff" (11 employees in unit)

0514-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Heritage Mechanical Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0522-88-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. Berto's Restaurant Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of St. Catharines, save and except assistant managers, persons above the rank of assistant manager and office staff" (42 employees in unit)

0530-88-R: Amalgamated Clothing & Textile Workers Union Toronto Joint Board (Applicant) v. Harmonie Home Fashions Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed during the school vacation period, employees in bargaining units for which any trade union held bargaining rights as of May 27, 1988" (11 employees in unit)

0552-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Applicant) v. The Consumers Millwork Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Stoney Creek, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

0553-88-R: Canadian Union of Public Employees (Applicant) v. Grey County Board of Education (Respondent) v. The Ontario Public Service Employees Union (Intervener)

Unit #1: "all educational assistants employed by the respondent in Grey County, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights as of May 30, 1988" (49 employees in unit)

Unit #2: "all educational assistants of the respondent in Grey County employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of May 30, 1988" (14 employees in unit) (*Having regard to the agreement of the parties*)

0555-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Randon Leasing (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors within a radius of 33 kilometres of the North Bay post office as well as in the geographic Township of Evanturel and the geographic Townships adjacent thereto, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0575-88-R: United Food & Commercial Workers International Union (Applicant) v. Cara Operations Ltd. (Respondent)

Unit #1: "all employees of the respondent at its Swiss Chalet Restaurant at 1970 Brock Road, Pickering, save and except Assistant Dining Room Managers, persons above the rank of Assistant Dining Room Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, at its Swiss Chalet Restaurant at 1970 Brock Road, Pickering, save and except Assistant Dining Room Managers, and persons above the rank of Assistant Dining Room Manager" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0578-88-R: Service Employees' Union, Local 210 Affiliated with Service Employees' International Union, AFL-CIO:CLC (Applicant) v. 740195 Ontario Inc. o/a La Petite Ecole de la Chaumiere (Respondent)

Unit: "all employees of the respondent in the Township of Maidstone, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

0589-88-R: Ontario Public Service Employees Union (Applicant) v. The Grey Bruce Regional Health Centre (Respondent)

Unit: "all office and clerical employees of the respondent in Owen Sound, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except employees in the bargaining units for which any trade union held bargaining rights as of June 3, 1988" (73 employees in unit) (*Having regard to the agreement of the parties*)

0590-88-R: Canadian Union of Public Employees (Applicant) v. Espanola & District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Espanola, save and except managers, persons above the rank of manager, and office and clerical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

0594-88-R: Toronto Printing Pressmen & Assistants' Union, Local No. 10 Subordinate to Graphic Communications International Union (Applicant) v. MPH Graphics Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

0611-88-R: Teamsters, Local No. 230, Ready-Mix; Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc., Permanent Concrete Division (Respondent)

Unit: "all employees working in and out of the respondent's pit and quarry operations in the Township of Cumberland, save and except foremen and persons above the rank of foreman, office, clerical and sales staff, dispatcher, and security guards" (33 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0619-88-R: Ontario Nurses' Association (Applicant) v. Carleton Place & District Memorial Hospital (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Carleton Place, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week" (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Carleton Place regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (26 employees in unit) (*Having regard to the agreement of the parties*)

0622-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Capital Construction Corporation (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0628-88-R: Retail, Wholesale & Department Store Union (Applicant) v. 500622 Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in its Murphy's Snack Foods division in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, route sales and quality control staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (33 employees in unit) (*Having regard to the agreement of the parties*)

0638-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Dinol International Canada Inc. (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisor, persons above the rank of supervisor, office, clerical and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

0639-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. G. Queiroga Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0640-88-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Schenker of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0663-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers. (Applicant) v. Catalyst Technology (Canada) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sarnia, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0664-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, (Applicant) v. Powerhouse Maintenance & Construction Inc. (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all boilermakers and boilermakers' apprentices in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0667-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Brass Craft Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the City of St. Thomas, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (87 employees in unit) (*Having regard to the agreement of the parties*)

0679-88-R: Graphic Communications International Union, Local 500M (Applicant) v. Magnalith Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Markham, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0685-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. Current Bay Enterprises Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0686-88-R: Christian Labour Association of Canada (Applicant) v. St. Catharines Place Retirement Centre Inc. o/a St. Catharines Place (Respondent)

Unit #1: "all employees of the respondent in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of St. Catharines regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office and clerical employees" (7 employees in unit) (*Having regard to the agreement of the parties*)

0699-88-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Perth County Board of Education (Respondent) v. Canadian Union of Public Employees, Locals 1477 & 1495 (Intervenors)

Unit: "all employees of the respondent employed as speech language pathologists, psychometrists, and attendance counsellors save and except the supervisor, those above the rank of supervisor, and employees for whom any trade union held bargaining rights as of June 16, 1988" (8 employees in unit) (*Having regard to the agreement of the parties*)

0705-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Gerry Lees Building Materials Ltd. c.o.b. as Beaver Lumber (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Penetanguishene, save and except forepersons, persons above the rank of foreperson, office and clerical staff, students employed during the school vacation period and persons

employed through a co-operative education program” (7 employees in unit) (*Having regard to the agreement of the parties*)

0707-88-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Vaughan Masonry Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0708-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. A.M.F. All Seasons Excavating Contractors (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0709-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Magine Contractor Inc. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0726-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. JYJ Janitorial Services (Respondent)

Unit: “all employees of the respondent in Maple, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

0730-88-R: Teamsters, Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Livingston International Inc. (Respondent)

Unit: “all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

0736-88-R: London & District Service Workers’ Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. 597068 Ontario Ltd. c.o.b. as Waverley Mansion (Respondent)

Unit #1: “all employees of the respondent in the City of London, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons regularly

employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of London regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office, clerical and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

0745-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Redpath Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Daymond Division in Mississauga, save and except supervisors/foremen, persons above the rank of supervisor/foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (140 employees in unit) (*Having regard to the agreement of the parties*)

0755-88-R: Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and employees in bargaining units for which any trade union held bargaining rights as of June 23, 1988" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0756-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Conrad Heating Co. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0769-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Generaso Construction 774050 Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0771-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Dewform Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0783-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Les Demolitions Laval Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0798-88-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Bradford Witness Publishing Company (1968) Ltd. c.o.b. Webman Web Offset Printers Unit: "all employees of the respondent in Guelph, Ontario, save and except production manager, persons above the rank of production manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

0843-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nu-Con Contracting Division of 766585 Ontario Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0871-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. D. B. Songer Construction (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0897-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Main Rehabilitation - Watermain Reconditioning & Cement Mortar (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0305-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Sandvik Tube Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 1568 (Intervener)

Unit: "all employees of the respondent in Arnprior, Ontario, save and except foremen and supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period or on a cooperative training programme" (128 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	125
Number of persons who cast ballots	120
Number of ballots marked in favour of National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada)	74
Number of ballots marked in favour of United Steel Workers of America	44
Number of ballots marked in favour of International Brotherhood of Electrical Workers, Local 1568	2

0490-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Signtech Inc. (Respondent) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Intervener)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, sales and accounting staff, students and persons working less than 24 hours per week" (102 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	99
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	96
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	85
Number of ballots marked in favour of intervener	9
Ballots segregated and not counted	3

0505-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc. (Respondent) v. Construction Workers Local 53, CLAC (Intervener)

Unit: "all employees of the respondent in the City of Chatham, save and except foreman, persons above the rank of foreman, batcher/dispatcher, office and sales staff and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0682-87-R: United Steelworkers of America (Applicant) v. Aluminart Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (73 employees in unit)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	71
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	32
Ballots segregated and not counted	1

0165-88-R: United Food & Commercial Workers International Union (Applicant) v. Welland Youth Group Home & Housing Programme Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in its Niagara Regional Youth Home Programme in the Regional Municipality of Niagara, save and except programme supervisor, persons above the rank of programme supervisor, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Applications for Certification Dismissed Without Vote

3071-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (15 employees in unit)

0550-87-R: Labourers' International Union of North America, Local 506 (Applicant) v. Avro Construction Inc. (Respondent) (7 employees in unit)

3267-87-R: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Ambois Insulation Contracting Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (6 employees in unit)

0227-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 584 551 Ontario Ltd. (Respondent) (3 employees in unit)

0380-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ellis-Don Ltd. (Respondent) (7 employees in unit)

0460-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Zeller's Inc. (Respondent) (63 employees in unit)

0521-88-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. White Oaks Tennis World Inc. (Respondent) v. Group of Employees (Objectors) (0 employees in unit)

0588-88-R: Teamsters, Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. G & W Freightways Ltd. Southern Express Lines Ltd. (Respondent) (24 employees in unit)

0599-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. 751621 Ontario Ltd. (Respondent) (2 employees in unit)

0620-88-R: Teamsters, Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Guiseppe Alfano & Sons Ltd. (Respondent) (11 employees in unit)

0621-88-R: Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Christian Care Centres of Leamington Ltd. c.o.b. as Leamington Lodge (Respondent) (10 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0310-88-R: United Steelworkers of America (Applicant) v. Sandvik Tube Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 1568 (Intervener)

Unit: "all employees of the respondent in Arnprior, Ontario, save and except foremen and supervisors, persons above the rank of foreman or supervisor, office and sales staff, and students employed during the school vacation period or on a cooperative training programme" (128 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	125
Number of persons who cast ballots	120
Number of ballots marked in favour of National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada)	74
Number of ballots marked in favour of United Steel Workers of America	44
Number of ballots marked in favour of International Brotherhood of Electrical Workers, Local 1568	2

0504-88-R: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Today's Business Products Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except assistant supervisor, persons above the rank of assistant supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (87 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	87
Number of persons who cast ballots	75
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	65

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3042-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hinderliter Heat Treating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Kitchener, save and except managers, persons above the rank of manager, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (43 employees in unit)

Number of names of persons on list as originally prepared by employer	36
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	20

0248-88-R: Service Employees' International Union, Local 183 (Applicant) v. Empress Gardens (Peterborough) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, registered nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3

Unit #2: "all employees of the respondent in the City of Peterborough regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, per-

sons above the rank of supervisor, registered nurses, office, clerical and sales staff' (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	5
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	4

0285-88-R: Ontario Nurses' Association (Applicant) v. Parry Sound District General Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Parry Sound District General Hospital for less than the full normal scheduled hours in Parry Sound, save and except Head Nurse and persons above the rank of Head Nurse" (50 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	14

Applications for Certification Withdrawn

0595-88-R: Toronto Printing Pressmen & Assistants' Union, Local No. 10 Subordinate to Graphic Communications International Union (Applicant) v. Ontario #664346 Ltd. o/a Lefor Web Press and Casa Mia Publishing & Typesetting Corp. (Respondents)

0652-88-R: Slimline Pipe Association Committee (Applicant) v. Slimline Pipe Inc. (Respondent)

0727-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. 590308 Ontario Inc. o/a Advance Excavating (Respondent)

0740-88-R: Draftsmen's Association of Ontario International Federation of Professional & Technical Engineers, Local 164, AFL-CIO:CLC (Applicant) v. McKenzie & Associates (Respondent)

0741-88-R: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Honda Canada Inc. (Respondent)

0781-88-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Giffin Sheet Metals Ltd. (Respondent)

0794-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sony of Canada Ltd. (Respondent)

0820-88-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Penetang-Midland Coach Lines Ltd. (Respondent)

0918-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. McCall Contractors Inc. (Respondent)

0973-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0288-88-FC: Ontario Secondary School Teachers' Federation (Applicant) v. Alma College (Respondent) (*Granted*)

0724-88-FC: United Steelworkers of America (Applicant) v. Caddiford Investments Ltd. c.o.b. as M.B.M. Ceramics (Respondent) (*Granted*)

0803-88-FC: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter referred to as the "Union") (Applicant) v. National Armoured Inc. (formerly Naduff Consultants Ltd.) (hereinafter referred to as the "Company") (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2883-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Corecon Construction Ltd., Corecon Holdings Ltd., First Malls Inc., Corecon Developments, Corecon Construction, Corecon Interiors, First Plazas Inc., Corecon Developments Inc., First Shopping Centres Inc. (Respondents) (*Withdrawn*)

3440-87-R: International Association of Machinists & Aerospace Workers (Applicant) v. Allcap Baggage Services Inc. and Airline Operators Committee (Respondents) (*Withdrawn*)

3379-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rick Hoy Excavating Ltd.; 620690 Ontario Inc., c.o.b. Cornerstone Construction (Respondents) (*Withdrawn*)

0879-88-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the District of Parry Sound; District of Parry Sound Welfare Administration Board; District Social Services, Parry Sound District (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2883-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Corecon Construction Ltd., Corecon Holdings Ltd., First Malls Inc., Corecon Developments, Corecon Construction, Corecon Interiors, First Plazas Inc., Corecon Developments Inc., First Shopping Centres Inc. (Respondents) (*Withdrawn*)

1117-87-R: United Food & Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Miracle Food Mart, Steinberg Inc.; and Loeb's IGA (Respondents) (*Dismissed*)

1917-87-R: International Association of Machinists & Aerospace Workers, Local Lodge 1740 (Applicant) v. Lawrence Sales Inc. (Respondent) (*Dismissed*)

2557-87-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators, Local No 582, Brantford (Applicant) v. The Corporation of the City of Brantford (Respondent) (*Dismissed*)

2705-87-R: United Steelworkers of America (Applicant) v. Canada Building Systems Inc. (Respondent) (*Withdrawn*)

2706-87-R: United Steelworkers of America (Applicant) v. Armtec Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3115-87-R: Stephen C. Hearn (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied

Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Frito-Lay Canada (Intervener) (*Granted*)

Unit: "all employees, including warehousemen, at Chatham, Ontario save and except route supervisors, office staff, students hired for the school vacation period, and persons regularly employed for not more than 24 hours per week" (4 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

3228-87-R: Volcine Williams (Applicant) v. International Ladies Garment Workers Union and Locals 14, 83 & 92 (Respondent) v. Riviera Slacks Inc. (Intervener) (*Dismissed*) (214 employees in unit)

3289-87-R: Darlene Fowler (Applicant) v. Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Respondent) v. General Mills Canada Inc. (Intervener) (*Granted*)

Unit: "all employees of General Mills Canada Inc. at its Red Lobster Restaurant at 1415 Kennedy Road in the Municipality of Metropolitan Toronto, save and except dinning room managers and persons above the rank of dining room manager" (66 employees in unit)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	42
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	38

3364-87-R: Robert John Chambers (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:-CLC and its Local 1000 (Respondent) v. Sears Canada Inc. (Intervener) (*Granted*)

Unit: "all Sears Canada Inc. employees at its Service Centre, in Peterborough, Ontario, save and except managers, supervisors, persons above the rank of manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (21 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	16

3449-87-R: Mora MacCormack et al (Applicant) v. Office & Professional Employees International Union, Local 131 (Respondent) (*Granted*)

Unit: "all office, clerical, and technical employees of Domglas Inc., it its Bramalea Plant Office located at 100 West Drive, Brampton, in the Township of Chinguacousy, save and except supervisors (including chief locator clerk), persons above the rank of supervisor, Quality Control Complaints Analyst, Personnel Department, Purchasing Agent, Paymaster, Secretary to Plant Accountant, secretaries to those above the rank of Department Manager, Head Office staff, Nurses, Security Guards, short-term contracted officer workers, students hired during the school vacation period or on co-operative training basis with a school or university, persons at present represented for collective bargaining purposes by the Aluminium, Brick and Glassworkers International Union and the Canadian Union of Operating Engineers" (20 employees in unit)

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	14

3450-87-R: Paul Turner (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 on its own behalf and on behalf of all other affiliated bargaining agents of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, (Respondent) (*Withdrawn*)

3488-87-R: Karen Doherty, Joanne Winkler, Deb Bender, Diane Cane, Barbara Steele, Mary Jones, Kenneth Stubbings, Kathryn Staples, Valerie Smith, Roland Hay, William Petrie, Nancy Norman, Eleanor Tryon & Stephen Wilson (Applicants) v. Canadian Union of Public Employees, Local 3180 (Respondent) (*Granted*)

Unit: "all employees of the Corporation of the County of Northumberland in the County of Northumberland, save and except supervisor, persons above the rank of supervisor, secretary to the Chief Administrative Officer, secretary to the Social Services Administrator, secretary to the Administrator of the Golden Plough Lodge, persons employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of January 28, 1987" (16 employees in unit)

Number of names of persons on list as originally prepared by employer	16
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	13

3511-87-R: Brian R. Slattery (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 252 (Respondent) (*Dismissed*)

Unit: "all of its employees working in its plant in Metropolitan Toronto, Ontario save and except foremen, persons above the rank of foreman, office and sales staff" (36 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	24
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose names appear on voters' list	3
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	8
Ballots segregated and not counted	3

3574-87-R: Otto Szabo (Applicant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

0222-88-R: Marion Low (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener) (*Dismissed*)

0225-88-R: Giuseppe DePieri (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Respondent) v. Luke's Carpentry Shop (a division of Colomar Holdings Ltd.) (Intervener) (*Granted*)

Unit: "all employees of the respondent in Guelph, save and except non-working foremen, persons above the rank of non-working foreman, security guards, office and sales staff" (7 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	7

0285-88-R: Ontario Nurses' Association (Applicant) v. Parry Sound District General Hospital (Respondent) (*Dismissed*)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Parry Sound

District General Hospital for less than the full normal scheduled hours in Parry Sound, save and except Head Nurse and persons above the rank of Head Nurse" (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	14

0313-88-R: Larry Steachowich on behalf of himself and a group of other employees (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. New Look Restoration (Ottawa) Ltd. (Intervener) (*Withdrawn*)

0318-88-R: Gladys C. Thatcher (Applicant) v. Canadian Union of Public Employees (Respondent) v. Chatham Kent Women's Centre Inc. (Intervener) (*Granted*)

Unit: "all employees in Chatham, save and except Assistant Administrator, persons above the rank of Assistant Administrator, persons regularly employed for not more than 24 hours per week, the Executive Secretary/Bookkeeper, new positions in which a person exercises managerial or confidential functions within the meaning of the Ontario Labour Relations Act" (7 employees in unit)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	4

0443-88-R: David A. Johnson (Applicant) v. Energy & Chemical Workers Union (Respondent) v. Rollit Products Ltd. (Intervener) (*Granted*) (3 employees in unit)

0487-88-R: Daniel Gagnon (Applicant) v. Toronto Printing Pressmen & Assistants Union, Local No. 10 (Respondent) v. Smith Folding Cartons Ltd. (Intervener) (*Dismissed*) (21 employees in unit)

0517-88-R: Kimberly Ann Vineham (employees) (Applicant) v. United Steelworkers of America (Union) (Respondent) (*Withdrawn*)

0536-88-R: William J. Labron (Applicant) v. U.F.C.W., Local 381 (Respondent) v. T.C.C. Bottling Ltd. (Intervener) (*Withdrawn*)

0587-88-R: Allan Clancy Oliver, President of Local Lodge D591 (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL:CIO:CLC, on behalf of Office Workers of its Local Lodge D591, Bath, Ontario (Respondent) v. Lafarge Canada Inc. (Intervener) (*Granted*) (6 employees in unit)

0631-88-R: Doug Hawtin (Applicant) v. Retail, Wholesale Dairy & General Workers Union (Respondent) (*Granted*) (6 employees in unit)

0641-88-R: Eugene D. Solomon, Member (Applicant) v. Retail, Wholesale & Department Store Union, Local 431 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2222-87-U: National Elevator & Escalator Association and its Member Company, Montgomery Kone Elevator Co. Ltd. (Applicant) v. Joseph Kennedy on his own behalf and on behalf of Local 96 of the International Union of Elevator Constructors and on behalf of the International Union of Elevator Constructors (Respondents) (*Withdrawn*)

0797-88-U: Ontario Refrigeration & Air Conditioning Contractors Association (“ORAC”) and The Maintenance & Service Contractors Association (“MSCA”) (Applicants) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787, Joe Carricato and Persons listed on Schedule “B” attached hereto (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0423-88-U: Mechanical Contractors Association of Ontario, Watts & Henderson Ltd., State Contractors Inc. (Applicants) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Sean O’Ryan, Mitch Griffiths and the members of the respondent local trade union employed by Watts & Henderson Ltd., Bill Weatherup, Members of the respondent local trade union employed by State Contractors Inc. (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2205-84-U: E. G. Thorpe (Complainant) v. Ontario Public Service Employees Union; The Ontario Council of Regents for Colleges of Applied Arts & Technology; The Board of Governors, Mohawk College of Applied Arts & Technology (Respondents) (*Withdrawn*)

2884-86-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Corecon Construction Ltd., Corecon Holdings Ltd., First Malls Inc., Corecon Developments, Corecon Construction, Corecon Interiors, First Plazas Inc., Corecon Developments Inc., First Shopping Centres Inc. (Respondents) (*Withdrawn*)

3138-86-U: Glass, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC (Complainant) v. Kohler Ltd. (Respondent) (*Granted*)

0154-87-U: United Food & Commercial Workers Union, Local 175 (formerly Local 409) (Complainant) v. Current River Foods Ltd. (Respondent) v. Boyd Albertini (Intervener) (*Withdrawn*)

0694-87-U: Reinaldo Santos (Complainant) v. Hotel Employees & Restaurant Employees Union, Local 75 (Respondent) v. Peel County Feed Co. Inc. (Intervener) (*Dismissed*)

1143-87-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. R. L. Crain Inc. (Respondent) (*Withdrawn*)

1937-87-U: Basavaraj Patil (Complainant) v. Canadian Paperworkers Union C.L.C., Local 304 (Respondent) (*Dismissed*)

2014-87-U: Canadian Union of Public Employees, Local 1582 (Complainant) v. Metropolitan Toronto Library Board (Respondent) (*Withdrawn*)

2177-87-U: Eugene D. Solomon (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) (*Withdrawn*)

2435-87-U: United Food & Commercial Workers International Union (Complainant) v. Coca-Cola Ltd. (Respondent) (*Withdrawn*)

2667-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), and Local 1967 (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Withdrawn*)

2787-87-U; 2788-87-U; 2789-87-U: United Food & Commercial Workers International Union (Complainant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

- 2894-87-U:** United Food & Commercial Workers International Union, Local 175 (formerly Local 409) (Complainant) & Current River Foods Ltd. (Respondent) (*Withdrawn*)
- 2926-87-U:** Georgina Nakeff & Rosemary Pell (Complainant) v. Graphic Communications International Union N-1 (Respondent) (*Withdrawn*)
- 2946-87-U:** United Steelworkers of America (Complainant) v. Guillevin International Inc. (Respondent) (*Withdrawn*)
- 2986-87-U:** Felicia Best (Complainant) v. Teamsters Local 419 (Respondent) v. Oshawa Foods Division of the Oshawa Group Ltd. (Intervener) (*Dismissed*)
- 3025-87-U:** Brantford Typographical Union, Local 378 Communications Workers of America (Complainant) v. Brantford Expositor, A Division of Southam Inc. (Respondent) (*Granted*)
- 3080-87-U:** United Food & Commercial Workers International Union (Complainant) v. Diner's Delite Foods Ltd. (Respondent) (*Withdrawn*)
- 3153-87-U:** John Pajackowski (Complainant) v. Canadian Auto Workers' Union, Local 397 (Respondent) v. I. B. L. Industries Ltd. (Intervener) (*Withdrawn*)
- 3248-87-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Bob Martin Construction Co. Ltd. (Respondent) (*Withdrawn*)
- 3266-87-U:** Ontario Public Service Employees Union (Complainant) v. Prescott-Russell Children's Aid Society (Respondent) (*Withdrawn*)
- 3272-87-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Hallman Construction Ltd. (Respondent) (*Withdrawn*)
- 3336-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 1000 (Complainant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)
- 3431-87-U:** Ontario Public Service Employees Union (Complainant) v. Central Toronto Youth Services (Respondent) (*Withdrawn*)
- 3466-87-U:** Warren Edward Rivers (Complainant) v. U.S.W.A., Local 4045 (Respondent) (*Dismissed*)
- 3470-87-U:** Joseph Brosseau (Complainant) v. James Caron and Local 494 United Brotherhood of Carpenters & Joiners of America (Respondents) (*Dismissed*)
- 3484-87-U:** David Lyons (Complainant) v. Canadian Guards Assoc. (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)
- 0001-88-U:** Evangeline Bolarinwa (Complainant) v. Canadian Union of Public Employees, Local 1343 (Respondent) (*Withdrawn*)
- 0111-88-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Peter Kiewit Sons Co. Ltd. (Respondent) (*Withdrawn*)
- 0151-88-U:** International Woodworkers of America (Complainant) v. M.N.T. Builders Ltd. (Respondent) (*Withdrawn*)
- 0172-88-U:** Hotel, Motel & Restaurant Employees Union, Local 442, AFL:CIO:CLC (Complainant) v. White Oakes Tennis & Racquet Club (Respondent) (*Withdrawn*)
- 0180-88-U:** Canadian Union of Restaurant & Related Employees, Hotel Employees, Restaurant Employees

Union, Local 88 (Complainant) v. Josmar Investments Inc. o/a Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

0218-88-U: Sharon A. Mills (now Brown) (Complainant) v. The Corporation of the City of Hamilton, Association of Professional & Administrative Employees, Executive Association; C.U.P.E., Ottawa & Local 167 (Canadian Union of Public Employees), Human Resources Centre, The Regional Municipality of Hamilton-Wentworth & The Corp. of the City of Hamilton (Respondents) (*Dismissed*)

0238-88-U: Hotel, Motel & Restaurant Employees Union, Local 442, AFL:CIO:CLC (Complainant) v. White Oaks Inn & Racquet Club (Respondent) (*Withdrawn*)

0239-88-U: Hotel, Motel & Restaurant Employees Union, Local 442, AFL:CIO:CLC (Complainant) v. White Oaks Inn & Racquet Club (Respondent) (*Withdrawn*)

0264-88-U: Kirk P. Wild (Complainant) v. Ford Motor Co. of Canada and National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 200 (Respondents) (*Dismissed*)

0284-88-U: Canadian Paperworkers Union (Complainant) v. Boise Cascade Canada Ltd. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 (Intervener) (*Withdrawn*)

0287-88-U: Ontario Secondary School Teachers' Federation (Complainant) v. Alma College (Respondent) (*Granted*)

0324-88-U: Jaime Mote (Complainant) v. CUPE Union, Local 1474 (Respondent) (*Withdrawn*)

0342-88-U: United Food & Commercial Workers International Union, Local 175 (formerly Local 409) (Complainant) v. Current River Foods Ltd. (Respondent) (*Withdrawn*)

0343-88-U: United Food & Commercial Workers International Union, Local 175 (formerly Local 409) (Complainant) v. Current River Foods Ltd. and James Baccari (Respondents) (*Withdrawn*)

0347-88-U: United Steelworkers of America (Complainant) v. Haley Industries Ltd. (Respondent) (*Withdrawn*)

0359-88-U: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Complainant) v. Cancoil Thermal Corporation (Respondent) (*Withdrawn*)

0396-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation, Local 111 and George Abadir (Respondents) (*Withdrawn*)

0414-88-U: Balford Lindsay (Complainant) v. Mike McKinnon (Respondent) (*Withdrawn*)

0451-88-U: Thomas A. Tangie (Complainant) v. Maria Wysocki and Ron Haggett and Ontario Public Service Staff Union (Respondents) (*Withdrawn*)

0483-88-U: Ed Vessel, Tom Thompson, Andy George (Complainants) v. C.A.W., Local 222, Re: William (Dave) Thompson (Respondent) (*Withdrawn*)

0485-88-U: Andrew Michael George (Complainant) v. C.A.W., Local 222 (Respondent) (*Withdrawn*)

0500-88-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America and John Stefanini (Respondents) (*Withdrawn*)

0508-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Form Rite Ltd. (Respondent) (*Withdrawn*)

0519-88-U: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Complainant) v. Cancoil Thermal Corporation (Respondent) (*Withdrawn*)

0531-87-U: Russell Jarvis (Complainant) v. Sheet Metal Workers' International Association, Local 30 and Peerless Enterprises, a division of Tectum Ltd. (Respondents) (*Dismissed*)

0539-88-U: John Albert Lalonde (Complainant) v. Doug Hewitt and Paul Dubruiel (Respondents) (*Withdrawn*)

0542-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Ottawa Towing Service (Respondent) (*Withdrawn*)

0564-88-U: Ontario Public Service Employees Union (Complainant) v. The Salvation Army Wycliffe Booth House/Rebekah House (Respondent) (*Withdrawn*)

0603-88-U: Patrick L. Kelly (Complainant) v. Multiver Ontario Ltd. and CAW Canada, Local 1661 (Respondent) (*Withdrawn*)

0642-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Cavalon Construction (Windsor) Ltd. (Respondent) (*Withdrawn*)

0665-88-U: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. The Consumer Millwork Company Ltd. (Respondent) (*Withdrawn*)

0683-88-U: Felicia Best (Complainant) v. Towers Department Stores and The Oshawa Group Ltd. (Respondents) (*Dismissed*)

0689-88-U: United Food & Commercial Workers International Union, Local 175 (formerly 409) (Complainant) v. Current River Foods Ltd. (Respondent) (*Withdrawn*)

0697-88-U: Mr. Gary Cookman and Mr. Chris Rivers (Complainant) v. Metro Toronto Ambulance Service, Mr. Tom Herbert - Area Supervisor, Mr. Dave Alexander - Executive Ass't (Respondent) (*Withdrawn*)

0725-88-U: United Steelworkers of America (Complainant) v. Caddiford Investments Ltd. c.o.b. as M.B.M. Ceramics, J. D. Barnett, Kimberley Vineham (Respondents) (*Withdrawn*)

0742-88-U: Ontario Nurses' Association (Complainant) v. Burk's Falls & District Hospital, Division of Huntsville District Memorial Hospital (Respondent) (*Withdrawn*)

0744-88-U: Canadian Union of Public Employees (Complainant) v. Kincardine & District Association for the Mentally Retarded (Respondent) (*Withdrawn*)

0759-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Stephenson Cafeterias Canada Inc. (Respondent) (*Withdrawn*)

0761-88-U: International Woodworkers of America (Complainant) v. M N T Builders Ltd. (Respondent) (*Withdrawn*)

0762-88-U: Christian Labour Association of Canada (Complainant) v. St. Catharines Place (Respondent) (*Withdrawn*)

0768-88-U: National Elevator & Escalator Association (Complainant) v. International Union of Elevator Constructors and J. Warner Baxter; International Union of Elevator Constructors, Local 50, Earnest Shaw and Thomas McCann; International Union of Elevator Constructors, Local 90 and Peter Verrage; International Union of Elevator Constructors, Local 96 and Joseph Kennedy; York Elevators Ltd. and Henry Render; Capital Elevators Ltd. and Ken Anderson; Televator Ltd. and Andy Johnson; Canadian Escalator &

Elevator Service Company Ltd. and John Ainsworth; Classic Elevators and Jack Parks (Respondents) v. J. Schindler Elevator Corporation (Intervener) (*Dismissed*)

0799-88-U: Graphic Communications International Union, Local 500M (Complainant) v. W. L. Smith & Associates Ltd. (Respondent) (*Withdrawn*)

0811-88-U: Laurentian University Staff Association (Complainant) v. Laurentian University (Respondent) (*Withdrawn*)

0826-88-U: Stephen Morvay (Complainant) v. Deborahe Lavellete & The Ontario Jockey Club (Respondents) (*Dismissed*)

0860-88-U: Gordon Brian Seaman (Complainant) v. C.U.P.E. Local 107 and Corporation of the City of London (Respondent) (*Withdrawn*)

0866-88-U: Doris Smith (Complainant) v. Red Oak Inn (Respondent) (*Dismissed*)

0887-88-U: Tracey Keeso (Complainant) v. Municipality of Metropolitan Toronto (Respondent) (*Dismissed*)

0892-88-U: Teamsters Local No. 418, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Honda Canada Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0526-88-M: Marjorie LeBlanc (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, C.A.W., and its Local No. 27 (Respondent Trade Union) v. Allied Bendix (Respondent Employer) (*Dismissed*)

JURISDICTIONAL DISPUTES

0186-84-JD: Spruce Falls Power & Paper Company Ltd. and Kimberly-Clark of Canada Ltd. (Complainants) v. International Brotherhood of Electrical Workers, Local 1149 and Local 89, Canadian Paperworkers Union (Respondents) (*Granted*)

2638-87-JD: Copper Cliff Mechanical Contractors Ltd. (Complainant) v. The Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, Local 1425, The Ironworkers District Council and International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Respondents) (*Dismissed*)

2943-87-JD: Millwright, Local 1916 and the Millwright District Council of Ontario (Applicant) v. International Association of Ironworkers, Local 736 and Commonwealth Construction Company (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1299-87-M: Canadian Union of Public Employees, Local 87 (Applicant) v. The Corporation of the City of Thunder Bay (Respondent) (*Granted*)

2189-87-M: Energy & Chemical Workers Union, Local 848 (Applicant) v. Southern Wood Products Ltd. (Respondent) (*Withdrawn*)

2841-87-M: Pauline Beauregard (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Dismissed*)

2947-87-M: Canadian Union of Public Employees, Local 1637 (Applicant) v. Ottawa General Hospital (Respondent) (*Dismissed*)

0392-88-M: Canadian Union of Public Employees, Local 54 (Applicant) v. The Corporation of the Town of Ajax (Respondent) (*Withdrawn*)

0409-88-M: Canadian Union of Public Employees, Local 1813 (Applicant) v. Muskoka-Parry Sound Health Unit (Respondent) (*Withdrawn*)

0421-88-M: United Steelworkers of America (Applicant) v. Noramco Mining Corp. (o/a Emerald Lake Resources Inc., Golden Rose Project) (Respondent) (*Granted*)

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*Ontario Labour Relations Board,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1988



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. SEPTEMBER

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FRONTENAC-LENNOX AND ADDINGTON COUNTY ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION 888

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Voluntary Recognition - Collective Agreement - Construction Industry - Construction Industry Grievance - Union and Employer entering into voluntary recognition agreement for employees engaged in concrete forming in all sectors in one Board area - Parties subsequently entering into collective agreements also limited geographically to formwork - Union local in another Board area alleging that employer was required to apply provincial ICI agreement - Employer arguing that concrete formwork was a recognized exception to the ICI scheme - Whether local formwork agreement inconsistent with statute - Whether it nevertheless creates ICI bargaining rights province-wide - Local formwork agreement declared null and void as it applies to the ICI sector - Voluntary recognition agreement, if it survives subsequent collective agreements, found to be ineffective insofar as the ICI sector is concerned - Grievances dismissed

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0579-88-R International Brotherhood of Painters and Allied Trades - Local 1824, Applicant v. 389188 Ontario Ltd. carrying on business as Allied Painting Contractors, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Practice and Procedure - Representative of petitioners disruptive during hearing - Individual excluded from hearing room pursuant to Statutory Powers Procedure Act - Petition not voluntary - Certificates issuing

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Craig Flood* and *George McMenemy* for the applicant; *Steve Setacci* for the respondent; *Dan Lachine* and *Peter Fink* for the group of employees.

DECISION OF THE BOARD; September 21, 1988

1. The name of the respondent appearing in the style of cause of this application is amended to read: "389188 Ontario Ltd. carrying on business as Allied Painting Contractors".

2. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The Board further finds, pursuant to section 144(1) of the Act, that all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, save and except non-working foremen and persons

above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The respondent filed a list of its employees as of the date of the making of the application. The list indicates that seven of these employees were classified as painters while the remaining two, namely Dave Roberts and John Osterhout, were both classified as a "labour-helper". At the hearing, no challenge was raised with respect to the status of the seven persons classified as painters. Further, all three parties agreed that Mr. Roberts had been employed as a labourer. The parties disagreed, however, as to the proper classification of Mr. Osterhout. The applicant submitted that Mr. Osterhout had been employed as a painter whereas the respondent and the group of employees objecting to the certification application contended that he had been employed as a labourer. Mr. Steve Setacci, the owner of the respondent, advised the Board that Mr. Osterhout was an unemployed bricklayer whom he had hired to work as a helper. Mr. Setacci stated that Mr. Osterhout had spent most of his time performing preparatory work, namely sanding and taping. He added, however, that on May 26, 1988, the date of the filing of the application, Mr. Osterhout had been staining the exterior boards on a motor inn. Mr. Fink, on behalf of the group of objecting employees, indicated that he did not take issue with Mr. Setacci's comments relating to Mr. Osterhout's duties. In the Board's experience, sanding and taping are tasks more generally performed by painters than by labourers. More importantly, the staining of exterior boards, which is the work Mr. Osterhout was performing on the application date, is clearly painters', as opposed to labourers', work. Accordingly, we are satisfied that on the application date Mr. Osterhout was, in fact, employed as a painter.

7. Having regard to the foregoing, the Board finds that on the date of the making of the application Mr. Roberts was not an employee in the bargaining unit. The Board further finds that Mr. Osterhout and the seven individuals classified by the respondent as painters were employees in the bargaining unit. The applicant filed acceptable evidence of membership with respect to five of the eight employees in the bargaining unit. In these circumstances, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 16, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. Prior to the terminal date there was filed a statement in opposition to the application for certification. The statement, frequently referred to at the hearing as a "petition", was executed on June 15, 1988 by the six bargaining unit employees who were still in the respondent's employ. The Board has a practice of exercising its discretion under section 7(2) of the Act to direct the taking of a representation vote on the basis of such a statement when, as here, it is signed by a sufficient number of union members as to indicate that the union no longer enjoys the support of more than fifty-five per cent of the employees in the bargaining unit. Before it will direct the taking of a representation vote on the basis of such a statement, however, the Board must be satisfied that the apparent change of heart on the part of those who had previously become union members was not motivated by a perceived threat to their job security or a concern that a failure to sign the document would be communicated to their employer and result in reprisals. The Board discussed its concerns in this regard in *Chatham Concrete Forming*, [1986] OLRB Rep. April 426:

16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present

case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities....

17. Frequently, as in the present case, anti-union petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable. Again, that is why the Act preserves the secrecy of union membership.

9. At the commencement of the hearing, the group of employees objecting to the certification application was represented by both Mr. Dan Lachine and Mr. Peter Fink. Mr. Lachine subsequently took the witness stand to give evidence concerning the origination of the statement in opposition to the certification application, as well as the circumstances under which it was signed by the employees. During this stage of the proceedings, Mr. Fink became increasingly disruptive. He repeatedly interrupted both the questions being put to Mr. Lachine as well as his answers. He did not do so by way of formal objections but rather by way of a series of interjections. These interjections became increasingly more frequent, more coarsely worded and more critical of the other participants at the hearing. On a number of occasions the Board Vice-Chair cautioned Mr. Fink concerning the impropriety of his conduct, but to no avail. Subsequently, Board Member Ballentine sought to reproach Mr. Fink for certain of his comments. Mr. Fink interrupted Mr. Ballentine and invited him to "step outside".

10. A tribunal such as the Board is empowered by the *Statutory Powers Procedure Act* to give whatever directions are necessary to prevent abuse of its processes and, in the appropriate case, to exclude from the hearing a non-lawyer who is representing one of the parties. The relevant portions of that Act provide as follows:

23.-(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

• • •

(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an advisor to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

11. Having regard to Mr. Fink's conduct at the hearing, the Board was led to conclude that Mr. Fink did not understand, and was not complying with, the duties and responsibilities of an advocate on behalf of the group of objecting employees. The Board further concluded that if the hearing was to continue in an orderly fashion, Mr. Fink would have to be excluded from the hearing room. Accordingly, following Mr. Fink's invitation to Mr. Ballentine to "step outside", the Board announced that it would break for the luncheon recess. Mr. Fink was then directed not to be in attendance when the hearing resumed following the recess. For the remainder of the hearing Mr. Lachine acted as the sole representative of the group of objecting employees.

12. Mr. Lachine testified that it was his idea to circulate a statement in opposition to the union. Mr. Lachine is classified as a working foreman. He is responsible for allocating work to other employees on the same job site as he. According to Mr. Lachine, prior to actually preparing the statement, he asked Mr. Setacci, the owner of the respondent, for the home phone numbers of the other employees. During this discussion, Mr. Lachine advised Mr. Setacci that he was planning on meeting with the employees to have them sign something. Mr. Setacci replied that this was fine, since he could use the opportunity to provide some paint to two employees who were working on a job site in Fergus.

13. On either the evening of June 13th or 14th, 1988 Mr. Lachine telephoned the other employees. He advised them that they should meet him at the Lau Products factory job site in Kitchener on the morning of June 15th. It appears that only one of the six employees who signed the statement was actually employed at this job site. Mr. Lachine was not assigned to the Lau Products site, but he had to stop off there to pick up some equipment to take to another site. Mr. Fink was assigned to the same job site as was Mr. Lachine, but because they travelled to work together he also would be at the Lau Products site. The respondent's employees generally start work at about 8:00 a.m. At 8:00 a.m. on June 15th Mr. Lachine met with all but one of the respondent's employees inside the Lau Products factory. Mr. Lachine showed the other employees a statement which he and his wife had prepared and asked if they would sign it. At the time, Mr. Setacci was some thirty feet away in view of the employees. Mr. Lachine initially testified that all of the employees signed the statement in the factory. Subsequently, however, he identified two individuals whom, he said, had signed outside the factory on a truck. Mr. Dwayne Manley, an employee called as a witness by the union, testified that he also had signed the document outside the factory on the tail gate of a truck. Mr. Manley added that Mr. Setacci was standing about ten feet away from him when he signed.

14. It will be recalled that two employees had been working in Fergus. In response to Mr. Lachine's phone call to them, they reported on June 15th to the Lau Products site. They signed the statement and then set off for Fergus with some paint provided to them by Mr. Setacci.

15. One employee did not report to the Lau Products job site. Instead, he reported to a Bell Canada site where he had been working. Mr. Lachine testified that this was because the employee lacked transportation. Mr. Lachine drove out to the Bell Canada site at about 9:00 a.m. on June 15th to obtain the employee's signature.

16. Mr. Lachine testified that subsequent to June 15th he advised Mr. Setacci that the employees had signed a petition. He stated that he believed this occurred on the same day that he mailed the document to the Board. The document was mailed by registered mail on June 16, 1986. Mr. Lachine testified that he took time off from work to mail the document. He added that it was not unusual for him to leave a job site. Mr. Lachine, accompanied by all of the respondent's current employees, attended at the Board hearing in a rented car paid for by Mr. Setacci.

17. The employees were initially contacted about signing a statement in opposition to the

certification application by Mr. Lachine, a working foreman with supervisory responsibilities. Mr. Lachine advised the employees that they were to attend at the Lau Products site. This includes two employees who were working in Fergus. The two employees from Fergus would have travelled back to Fergus after the time that they normally would have started working. Once at the Lau Products site, the employees were asked to sign the statement within view of Mr. Setacci. Two of them did so. Subsequently, some of the employees signed the document outside the factory. Mr. Setacci was standing nearby when at least one of them signed. The one employee not at the Lau Products site was visited during working hours by Mr. Lachine to get him to sign the document. These circumstances would have led the employees to reasonably conclude that Mr. Lachine was acting with Mr. Setacci's approval. It would also have been reasonable for the employees to assume that Mr. Lachine would subsequently discuss the statement with Mr. Setacci, as in fact he did. In these circumstances, it is just as probable that union members signed the document to avoid singling themselves out as union supporters, as to evidence a change of heart about the union. Accordingly, we are unable to accept the statement as evidence of a clearly voluntary signification on the part of the union members who signed it that they no longer support the union. In the circumstances, we are not prepared to direct the taking of a representation vote.

18. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0958-88-M Canadian Pneumatic Control Contractors Association (on behalf of Johnson Controls Ltd. and Landis & Gyr Powers Ltd.), Employer v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry in the United States and Canada, Trade Union

Collective Agreement - Conciliation - Reference - Union taking position in prior Board matters that it was bound to collective agreement - Not open to union to argue in this matter that collective agreement not operative - Minister having no authority to appoint a conciliation officer - Parties already bound by collective agreement

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Paul Young* and *Bill Scrafton* for the Canadian Pneumatic Control Contractors Association; *Richard J. Nixon* and *Bill Scrafton* for Johnson Controls Ltd.; *David Elenbaas*, *Robert Sellers* and *Al DeWachter* for Landis & Gyr Powers Ltd.; *A. J. Ahee* and *S. O’Ryan* for the trade union.

DECISION OF THE BOARD; September 19, 1988

1. The name of the employer is amended to read: “Canadian Pneumatic Control Contractors Association (on behalf of Johnson Controls Ltd. and Landis & Gyr Powers Ltd.)”.
2. Pursuant to section 107 of the *Labour Relations Act*, the Minister has referred the following question to the Board: are the parties presently bound by a collective agreement so as to deny the Minister the authority to appoint a conciliation officer in the circumstances of this case?
3. The parties before us stated their positions through counsel and they determined it was not necessary to call any oral evidence. There was no material dispute concerning the factual context of this application. After reviewing the facts and entertaining the parties’ submissions and after recessing to consider the matter, the Board advised the parties orally at the hearing that it was satisfied the parties are bound to a collective agreement and that it would advise the Minister he has no authority to appoint a conciliation officer in the circumstances of this case.
4. The material facts and the reasons for the Board’s decision are as follows. The last signed collective agreement between the Canadian Pneumatic Control Contractors Association (“the Association”) and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the “UA”) was for a term of two years and had an expiry date of December 31, 1982. This national collective agreement provided that it would be in full force and effect until December 31, 1982, and “from year to year thereafter unless notice of termination or modification is given in writing by either party to the other party, sixty (60) days prior to each anniversary date of December 31”. Neither party gave the required notice and the collective agreement renewed for yearly periods up to December 31, 1987. On September 10, 1987, the UA gave notice to the Association of its intention to renegotiate the collective agreement. Although this notice was untimely, the parties did meet on a number of occasions in December 1987 and January 1988 to discuss terms for a new collective agreement. The UA bases its entitlement to the appointment of a conciliation officer on the negotiation sessions and subsection 16(2) of the Act.
5. Local 46 of the UA made a number of applications for certification against member companies of the Association which came on for hearing on February 26, 1988. Mr. O’Ryan

appeared at that hearing for Local 46 with counsel and advised the Board that he was also there on behalf of the International. The parties in those matters agreed that they were bound by the collective agreement which was not in its open period. Since the applicant already had bargaining rights for the respondent, the Board dismissed the certification applications.

6. No negotiation meetings between the parties occurred subsequent to February 26, 1988. By application dated March 8, 1988, the UA requested the appointment of a conciliation officer under section 16 of the *Labour Relations Act*.

7. A letter dated June 23, 1988 addressed to a representative of a member company of the Association from Mr. J. St. Eloi, Director of Canadian Affairs, UA, was placed before us. Mr. St. Eloi was present at the negotiation meetings referred to earlier. We are satisfied that Mr. St. Eloi takes the position in the letter that the collective agreement is still in effect and will be in effect until notice to renegotiate is given. We were also given letters dated in March 1988 signed by representatives of UA locals in other provinces which give notice to bargain a new collective agreement. The Board did not give any weight to these latter letters since they were not from a party to the agreement and there was no evidence to indicate that these locals had the authority to give notice to bargain.

8. When the hearing before the present panel commenced, counsel for the UA advised the Board that the collective agreement his client had with the Association was operative. After some questions from the Board, counsel asked for a brief recess in order to discuss the matter with his client. When the hearing resumed, counsel indicated that they were starting over and took the position that the collective agreement did not renew subsequent to December 31, 1987 but that the terms of the collective agreement continued to be applied by the Association's member companies. With respect to what occurred at the February 26, 1988 hearing, counsel advised that it was his client's position that it was mistaken when it advised the Board at that time that the collective agreement was operative.

9. In determining that there was a collective agreement in force between the Association and the UA, the Board reviewed all of the circumstances. The fact that negotiations occurred is some evidence that the parties did not intend the collective agreement to renew. However, after the negotiating meetings were held, the UA appeared at the Board and took the position that it was then bound by the collective agreement. In June 1988, a UA representative who participated in the negotiations took the position that the collective agreement was still in force. This was the initial position of the UA when the hearing in this matter commenced. The facts suggest that from at least February 1988 until the hearing of this application, the UA took the position that the collective agreement was in full force and effect. The words of subsection 16(2) clearly indicate that the purpose of a conciliation officer appointment is to have an officer "confer with the parties and endeavour to effect a collective agreement". Since the UA has maintained as outlined above that a collective agreement exists, the reason for appointing a conciliation officer is no longer present. In the Board's view, it is not open for the UA to take the position at the hearing of this application that the collective agreement is not operative because it suits its purpose in this proceeding. These are circumstances in which it is appropriate to hold the UA to the position it took at the February 1988 Board hearing and maintained subsequently until the hearing of this matter. The Board notes that in less than two months from the hearing in this case, the parties will be in another open period under the Act.

10. Accordingly, the Board was satisfied that at the relevant time the Association and the UA are bound to a collective agreement and that the Minister has no authority under the Act to appoint a conciliation officer.

0146-88-U; 0481-88-R United Food and Commercial Workers International Union, Local 175, Complainant v. **Canton - East Ferris - Township**, Respondent v. Robert R. Voyer, Intervener; Mr. Robert R. Voyer, Applicant v. United Food and Commercial Workers International Union, Local 175, Respondent

Duty to Bargain in Good Faith - Remedies - Termination - Timeliness - Unfair Labour Practice - Breach of good faith bargaining duty - Parties ordered to sign collective agreement - Collective agreement to have effect as of the date it would have been signed if not for the unfair labour practice - Termination application filed after that time rendered untimely

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. Montague*.

APPEARANCES: *Harold F. Caley* and *Jim Crockett* for the complainant in Board File No. 0146-88-U and for the respondent in Board File No. 0481-88-R; *Robert R. Voyer* on his own behalf as intervener in Board File No. 0146-88-U and as applicant in Board File 0481-88-R; *C. C. White* and *F. B. Claridge* for the respondent in Board File No. 0146-88-U;

DECISION OF THE BOARD; September 21, 1988

1. In a decision dated July 4, 1988, the Board (differently constituted in part) recorded its oral ruling, *inter alia*, that the section 89 complaint be heard first when the hearing was to be reconvened on August 18, 1988.

2. Accordingly, on that date, the Board heard the evidence and representations of the parties with respect to the section 89 complaint (Board File No. 0146-88-U) and, as well, with respect to the potential impact on the termination application (Board File No. 0481-88-R) of the Board's disposition of that unfair labour practice complaint. Having weighed and assessed the testimony, in the context of the usual factors going to credibility, the documentary evidence and what is reasonably probable in the circumstances, the Board makes the following findings of fact.

3. The complainant, the United Food and Commercial Workers International Union, Local 175, ("the union"), was certified on April 9, 1987. The parties entered negotiations and held a series of bargaining sessions. Representing the union were J. Crockett (regional director and chief negotiator), Bill Richardson (a union official) and V. Guillemette (a bargaining unit member). The employer bargaining committee comprised F. Claridge (town clerk), W. Vrebosch (mayor), D. Sanders (councillor) and W. Hotten (consultant hired as chief negotiator). At a conciliation meeting on October 9, 1987, the bargaining committee reached a tentative settlement. The employer called a special meeting of the town council and, subject to the insertion in the text of certain matters also agreed to by the bargaining committees, passed a resolution accepting the terms of the collective agreement to be effective from October 27, 1987 to October 26, 1989. For its part, the union convened a ratification meeting at which the tentative agreement was reviewed. This contract, however, was rejected on a secret ballot vote by a five to one margin. Several concerns were raised by the membership including the inclusion of a part-time employee (R. Perron) on the recall rotation schedule, an additional statutory holiday, the rate bargaining unit members were to be paid if recalled on rotation to the position of "wing-man" and the inclusion in the bargaining unit of the arena supervisor (R. Voyer) and the roads supervisor (R. Boudreau). To elaborate briefly on the latter issue, the union had accepted the employer's position that the two supervisors should be in the bargaining unit to enable them to continue to perform their usual duties, given the size of the bargaining unit and the employer's limited financial resources. Apparently,

the two supervisors in question (Voyer and Boudreau) attended the ratification meeting and were permitted to vote on the proposed contract.

4. Following the meeting, Crockett informed Claridge by telephone that the membership had rejected the tentative agreement. The parties resumed negotiations and, on January 4, 1988, again reached a tentative settlement which added another statutory holiday. As well, the letter of understanding resolved the recall rotation status of R. Perron and the wage rate for recall to the position of wing-man on the basis desired by the membership.

5. The union negotiating committee recommended acceptance of the collective agreement at a meeting on January 27, 1988. In Crockett's view, the agreement addressed the members' earlier concerns except with respect to the inclusion of the two supervisors. In that regard, Crockett reiterated his view that it was realistic and reasonable to accept the employer's position that those two persons should be included in the unit in the circumstances. At that meeting, a new issue was raised by the members. That is, it appeared the members now wanted to base recall from layoff on seniority rather than rotation, contrary to their earlier view. Crockett explained that the union could not return to the bargaining table with an entirely novel proposal without violating its duty to bargain in good faith. Further, Crockett indicated that, as matters now stood, the membership could either ratify the agreement or reject the deal on the basis that the rejection also amounted to a vote to strike. The ballot, therefore, gave two options: accept the employer's offer or reject the offer and strike. The vote was again by secret ballot. R. Perron was not permitted to vote in the (mistaken) belief that the amendments to the collective agreement excluded her from the bargaining unit entirely rather than just the recall rotation schedule. The result was four against and one for acceptance. At this point, Crockett stated he would return the following week with picket signs and such like and a legal strike would be commenced. Discussions became somewhat heated. Voyer and Boudreau left the meeting. Crockett continued to speak with the remaining bargaining unit members as to why the offer had been rejected.

6. It should be noted that Crockett also met prior to the scheduled start of the January 27th meeting with Guillemette and two brothers in the bargaining unit (R. Champagne and D. Champagne) to explain, in the absence of the supervisors, the rationale for the inclusion of the supervisors in the bargaining unit. Crockett emphasized that, if the supervisors tried to take advantage of another bargaining unit member by using their supervisory position, the member could seek redress from the executive board of the union for such improper conduct by one member against another.

7. The following morning, Claridge was telephoned by Crockett and told the contract had again been rejected and the apparent reasons for that rejection. Crockett also indicated that, after consulting with other union officials, he would get back to Claridge as to the next step. Shortly following the membership meeting, the union received a letter dated January 28, 1988 signed by five of the six bargaining unit members (including R. Perron) raising several concerns and emphasizing that they would neither go on strike nor accept any collective agreement presented by the union. Only Guillemette did not sign the letter. Faced with the prospect of a refusal to either strike or accept an offer, the executive board was authorized by the international president to decide whether to accept or reject the final offer, pursuant to Article 23(D)(6) of the International Constitution. By letters dated February 26, 1988, the union informed all bargaining union members that the union would be accepting the collective agreement. The employer was also informed of the union's decision in a letter of the same date. The employer replied in writing on March 29, 1988 that it would not ratify the contract at that time given that it was unaware of the union's constitutional provisions purportedly allowing for ratification without membership approval and given its concern over the contents of the January 28th letter sent to the union by all but one of the bargain-

ing unit members (and copied to the employer). The union did not contact the employer following this letter (copies of the finalized collective agreement had been forwarded to the employer on March 15, 1988 for signature.) Rather, the instant complaint was filed on April 18th. It is useful to hear note the termination application was filed on May 18th.

8. The Board next states the representations of the parties in a highly abbreviated form.

9. Counsel for the complainant union reviewed the evidence to support his assertion that the respondent had violated sections 15 and 64 of the Act in refusing to execute the collective agreement. In short, it was argued that the January 28th letter from the bargaining unit members to the union was not the "employer's business". Neither the matters raised in that letter nor the provisions of the union's constitution justified the refusal to sign the collective agreement. Counsel also reviewed the relevant jurisprudence dealing with ratification of collective agreements in the context of the bad faith bargaining and interference with a trade union: *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309; *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421; *Lilo Rail of Canada Limited*, [1983] OLRB Rep. Sept. 1496; *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337; *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. June 507; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; *Saville Food Products Inc.*, [1986] OLRB Rep. Apr. 552; *Nortec Air Conditioning Industries Ltd.*, [1988] OLRB Rep. Feb. 179; *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138; *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. Oct. 1722; *Sparton of Canada Limited*, [1985] OLRB Rep. Sept. 1420; *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688; *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954.

10. Counsel for the respondent employer also reviewed the evidence and asserted the facts did not support a finding of a breach of section 64 of the Act. With respect to the section 15 duty to bargain in good faith, it was argued that the ostensible refusal to execute the collective agreement in Claridge's letter of March 29th was not a *prima facie* breach of that duty but, rather, a request for clarification to which the union did not respond. Counsel stressed the unique circumstances for this case, in his view, namely, the January 28th letter from the bargaining unit members to the union, the small size of the bargaining unit, the decertification application and the tone of the employer's letter of March 29th itself. Counsel acknowledged that his assertion amounted to a departure from the jurisprudence but contended that departure was warranted in this instance. In the alternative, it was asserted that the remedial relief should comprise only a declaration of a breach of section 15 and any direction to execute a collective agreement should not operate so as to render the termination application untimely. With regard to this latter issue, counsel referred to: *North American Plastics Co. Ltd.*, [1969] OLRB Rep. Sept. 797; *Rock Haven Motels (Peterborough) Limited*, [1980] OLRB Rep. Aug. 1240.

11. R. Voyer, the applicant in the termination application who participated in the section 89 complaint as an intervener, agreed with the respondent counsel's submissions that the termination application should proceed even if the Board found a violation in the section 89 complaint.

12. In reply, union counsel distinguished the cases cited by the respondent, asserting the *Treco Machine* case, *supra*, had dealt with the question of the impact on a termination application filed, as here, subsequent to a section 89 complaint of a finding of bad faith bargaining. That is, counsel argued the termination application should be dismissed as untimely should the Board uphold the section 89 complaint and direct execution of the contract.

13. The issue of ratification votes has not infrequently arisen in Board proceedings. In dealing with that question, the Board has recognized that ratification votes, while not uncommon, are not mandatory under the *Labour Relations Act*. The Board has found that an employer's insistence

on such votes fails to recognize the union's role as the sole and exclusive bargaining agent of the employees in the bargaining unit and, thus, contravenes section 15 of the Act: *The T. Eaton Company Limited*, *supra*; *Wilson Automotive (Belleville) Ltd.*, *supra*; *Fotomat Canada Limited*, *supra*; *Northwest Merchants*, *supra*; *Treco Machine Tool Limited*, *supra*; *Nortec Air Conditioning*, *supra*. Even if a ratification vote is held, the union is not bound by that result: *The T. Eaton Company*, *supra*; *K-Mart Distribution Centre*, *supra*. Moreover, in testing the wishes of the employees, the union is entitled to characterize the question as either a vote for acceptance of the employer's offer or a vote to reject that offer and to strike: *Lilo Rail of Canada*, *supra*. The Board affirms the reasoning in those cases but does not regard it as necessary to set out the relevant passages herein.

14. In the instant case, it was not disputed that the two negotiating committees had resolved all matters in dispute between them in January 1988. The respondent did not argue that there was any further conduct needed in the nature of "ratification" of the contract on the part of the employer given the town council resolution of October 1987. For its part, the union negotiating committee agreed to recommend the contract to the employees. In Crockett's opinion, there was "no where else to go in negotiations", the employees should either accept the deal or strike. As noted earlier, there was nothing improper in characterizing the ballot as "acceptance" or "rejection and strike". The result of the strike vote (four to one rejecting the offer) coupled with the sentiments expressed in no uncertain terms in the January 28th letter meant the union was faced with a bargaining unit which refused to ratify a contract but also refused to strike. Relying on the provisions in its constitution, specifically Article 23(D)(6), the union decided to accept the contract. It was not asserted the union failed to act in accordance with the terms of Article 23(D)(6) in reaching its decision and notifying the employer on February 26th that the contract was accepted. In the Board's view, the employer was not justified in refusing to execute the collective agreement on the grounds set out in its letter of March 29th. In the context of the jurisprudence, that refusal amounted to a violation of a duty to bargain in good faith. An employer is not entitled to avoid its obligations to execute a collective agreement by raising concerns about the wishes of the employees in the bargaining unit or the provisions in the union's constitution regarding ratification and/or acceptance/rejection of tentative settlements. Both concerns undermine the union's role as sole and exclusive bargaining agent by insinuating the employer into the relationship between the union and those it is entitled, and obliged, to represent. The Board is not persuaded that the facts of the instant case warrant a departure from the reasoning in the cases noted earlier. Thus, the Board finds the employer has contravened section 15 of the Act.

15. The Board next considers the relief appropriate to that violation. In addition to a declaration, the Board directs the respondent formally execute the collective agreement agreed to by the parties. This direction does not constitute the imposition of a collective agreement but, instead, recognizes what the parties have themselves negotiated: *Fotomat Canada*, *supra*; *Treco Machine & Tool*, *supra*. In the instant case, as noted, there is no doubt that bargaining had concluded nor is there any doubt as to what terms and conditions had been agreed to by the employer and the union: *Sears Canada Inc.*, [1986] OLRB Rep. Aug. 1159; *Mississauga Hydro Commission* (1984), 17 L.A.C. (3d) 299 application for judicial review dismissed June 21, 1985; *Canteen of Canada Ltd.* (1984), 15 L.A.C. (3d) 305; *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221. Where one party improperly refuses to formally execute a collective agreement, the Board has directed such execution: *Treco Machine & Tool*, *supra*; *Fotomat Canada*, *supra*; *Wilson Automotive (Belleville)*, *supra*; *Municipality of Casimir, Jennings and Appleby*, *supra*; *Landmark Motor Inn* (Board File 2342-87-U unreported August 2, 1988).

16. The respondent and intervener asserted that any direction to execute a collective agreement should not operate to bar the termination application as untimely. The Board does not consider the cases cited by counsel for the respondent (*North American Plastics*, *supra*; *Rock Haven*

Motels, supra) as useful, at the very least, in view of the timing of the bad faith bargaining complaint in relation to the filing of the termination application in the instant case. In contrast, the analysis in *Treco Machine & Tool, supra*, implies that a successful bad faith bargaining complaint which results in a direction to execute a collective agreement would create a bar to a termination application filed after the section 89 complaint.

17. The Board is satisfied that, had the respondent not refused to execute the collective agreement on receipt of the union's written notification on February 26, 1988 of its acceptance of the contract, the collective agreement, effective from October 27, 1987 to October 26, 1989, would have been executed and in force in February of 1988, well in advance of the filing of the termination application. That is, the termination application would be barred as untimely by operation of statute. An opportunity to test the union's representation rights should not be *created* by virtue of the respondent's unlawful conduct where *no* such opportunity would otherwise exist within the *statutory* scheme. Such a result is neither consonant with the statutory scheme nor with sound labour relations policy. At the time that the collective agreement would have been formally executed but for the respondent's unfair labour practice, the trade union was acting as the duly authorized bargaining agent of the employees in the bargaining unit. That collective agreement, by virtue of section 50 of the Act, would have bound the employer, the trade union *and* the employees in the bargaining unit.

18. The Board possesses a broad remedial authority under section 89(4) to fashion "make whole" remedies which effectively return the parties to the position they would have been in had the unlawful conduct not occurred: *Radio Shack*, [1979] OLRB Rep. Dec. 1220 upheld 80 CLLC ¶14,017 (Ont. Div. Ct.), application for leave to appeal to the Court of Appeal refused March 10, 1980. To do less than this would provide a strong incentive to breach the Act. In the instant case, such a "make whole" remedy consists of a Board direction that the employer *formally* execute the collective agreement composed of those terms and conditions to which it had indisputably agreed and to make that collective agreement binding as of February 9, 1988 when it would have been binding had the employer not violated its obligations under section 15 of the Act. [The undisputed duration of the collective agreement is October 27, 1987 to October 26, 1989.] The consequent effect of the "make whole" remedy which would restore the employer and the bargaining agent of the employees in the bargaining unit to the position that would have existed "but for" the unlawful conduct, is that the termination application is untimely under section 57 of the Act. Another effect of the Board's remedial direction is that the employees in the bargaining unit are entitled to the benefits of the collective agreement negotiated by their bargaining agent.

19. In view of the Board's findings with regard to section 15 of the Act, it is not necessary to consider separately the remaining allegations, particularly, that section 64 was likewise violated.

20. Having regard to the foregoing, the Board:

- (a) declares that the respondent breached the section 15 duty to bargain in good faith by refusing to execute the aforementioned collective agreement when notified of the union's acceptance;
- (b) directs the respondent to formally execute and implement forthwith the aforementioned collective agreement and further directs that the collective agreement shall have binding effect under section 50 of the Act as of February 26, 1988, and that its duration shall be from October 27, 1987 to October 26, 1989 (as agreed by the parties);
- (c) dismisses the termination application (Board File No. 0481-88-R).

21. The Board remains seized in the event any dispute arises over the interpretation or implementation of the Board's order.

0814-88-R; 0815-88-R; 0848-88-R; 0849-88-R; 0850-88-R The Ontario Public Service Employees Union, Applicant v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Tarandus Associates Limited, Respondent; The Ontario Public Service Employee's Union, Applicant v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and **Charmaine's Janitorial Services**, Respondent; Ontario Public Service Employees Union, Applicant v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Moose Creek Forestry Company, Respondent; Ontario Public Service Employees Union, Applicant v. Gullwing Forestry Ltd., Respondent; Ontario Public Service Employees Union, Applicant v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Harold Luckasavitch, Respondent

Crown Transfer - Whether Board should issue declaration that Crown transferred undertaking to private entity - Functions of transplanting seedlings, performing janitorial services and providing information and permits to Algonquin Park users previously carried out by Crown - Board finding that "undertaking" in *Crown Transfers Act* does not include the mere performance of labour in itself - However the provision of services may constitute an undertaking because of the nature of undertakings carried out by government - Board finding transfer of undertaking or part of an undertaking - Private entity bound by collective agreement between crown and union

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *P. Grasso*.

APPEARANCES: *Alick Ryder*, Q.C. and *Ethel Laualley* for the applicant; *C. G. Riggs*, *J. T. Thomson*, *M. Campbell* and *T. Smith* for Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources; *S. Donald Speller* for Tarandus Associates Ltd.; *Mr. Olmstead* for Charmaine's Janitorial Services; *Harold Luckasavitch* on his own behalf.

DECISION OF THE BOARD; August 26, 1988

I

1. These matters were scheduled and heard together.

2. No one for Moose Creek or Gullwing having appeared by the scheduled commencement of the hearing at 9:30 a.m., we waited until 10:00 a.m. and began the hearing when no one had appeared by that time.

3. In each of these cases, except Board File No. 0849-88-R, the Ontario Public Service Employees Union ("O.P.S.E.U." or "the union") seeks a declaration under the *Successor Rights (Crown Transfers) Act* ("the *Crown Transfers Act*" or "the Act") that The Crown in Right of

Ontario as represented by the Ministry of Natural Resources (“the Crown” or “M.N.R.”) transferred within the meaning of clause 1(1)(f) of the Act a named undertaking to a private entity and that in each case the private entity is bound by the collective agreement extant between OPSEU and the Crown.

4. At the outset of the hearing, counsel for OPSEU withdrew its application in File No. 0814-88-R to which there was no objection from the respondent therein.

5. The allegation in File No. 0815-88-R is that the Crown transferred “janitorial services for comfort stations, vault toilets, vault privies and garbage disposal buildings” in Algonquin Provincial Park (“the Park”) to Charmaine Olmstead c.o.b. as Charmaine’s Janitorial Services (“Charmaine’s”). In File No. 0848-88-R, OPSEU alleges that “the transplanting [of] black and white seedlings at the Dryden Nursery” has been transferred from MNR to Moose Creek Forestry Company (“Moose Creek”) which, as part of the same transaction, transferred it to Gullwing Forestry Ltd. (“Gullwing”). The alleged transfer in File No. 0850-88-R is of “the concession to provide Algonquin Park interior access point and campground services at Rock Lake Campground, Coon Lake Campground and Rock Lake Interior access point” from MNR to Hal Luckasavitch (“Luckasavitch”).

6. File No. 0849-88-R is an application by OPSEU for a declaration under section 63 of the *Labour Relations Act* (“section 63”) that there has been a sale of a business by Moose Creek to Gullwing. It was filed as an alternative to the application in File No. 0848-88-R but was not pursued at the hearing by OPSEU. MNR does not contend that Moose Creek no longer performs the transplanting which is the subject of the application in File No. 0848-88-R. The evidence is that Gullwing and another entity, Rugby Lake, are non-incorporated entities which perform certain functions for Moose Creek but that all employees are on a single payroll, that of Moose Creek, and that they and the functions they perform are under the control of Moose Creek or its principal, William Skene. Accordingly, the application in File No. 0849-88-R is hereby dismissed, there being no transfer subsequent to that from the Crown to Moose Creek.

7. In each case, whether transplanting seedlings, performing janitorial services or providing information and permits to Park users, the functions being performed by the employees of the private respondent (or by Luckasavitch and his wife) were previously carried out by employees of MNR. The questions to be determined by us are two: do these functions constitute an “undertaking” within the meaning of clause 1(1)(h) of the *Crown Transfers Act*; and if they do, have they been “transferred” from the Crown to the private respondents within the meaning of clause 1(1)(f) of the Act? Counsel for the Crown contends that all these contracts constitute “sub-contracts” of the work involved and therefore do not fall within the meaning of “undertaking” in clause 1(1)(h) of the Act.

II

8. The relevant portions of the *Successor Rights (Crown Transfers) Act* are as follows:

1.-(1) In this Act,

• • •

(f) “transfer” means a conveyance, disposition or sale;

• • •

(h) “undertaking” means a business, enterprise, institution, program, project, work or a part of any of them.

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

...

11.-(1) Where, on an application before the Board under this Act, a question arises as to whether an undertaking has been transferred from the Crown to an employer, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

...

(3) Where, on an application under this Act, an employee organization, trade union or council of trade unions alleges that an undertaking was transferred from the Crown to an employer or from an employer to the Crown, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

9. The labour relations purpose of the *Crown Transfers Act* parallels that of the “sale of a business” provisions found in section 63 of the *Labour Relations Act*, the comparable portions of which are:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

10. In both cases, the intent is to preserve the bargaining rights of the union where there has been a change in the employer but a continuation of the economic entity which constitutes the business, in the case of section 63, or of an undertaking, in the case of the *Crown Transfers Act*. In the context of section 63, the Board explained in *Marvel Jewellery*, [1975] OLRB Rep. Sept. 733, at para. 8, that it

- 8. ... recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become

attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

Underlying both the *Crown Transfers Act* and section 63 is the appreciation that where the essential activity remains the same, but carried out by another employer, and the essential employment relationship remains the same, the union's bargaining rights and the employees' choice of representation by that union should be continued. As the Board said in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702, at para 6, an "important purpose of section [63] is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition".

11. In compliance with its obligation under section 11 of the Act to "adduce at the hearing all facts within [its] knowledge that are material to the allegation" the Crown called Mark Campbell, the nursery operations manager in Dryden since 1979, to testify with respect to the purported transfer of the transplanting operation and Thomas Smith, who has been park operations manager in Algonquin Park for four years, to testify about the alleged transfers to Charmaine's and Luckasavitch. Neither Charmaine's nor Luckasavitch called any evidence. The union did not call any evidence.

III

12. We deal first with the alleged transfer to Moose Creek Forestry. The nursery at Dryden comprises 2,900 acres of Crown land, 100 acres of which are under production with a stock of seven million bare root trees and four million container stock seedlings. In late April or early May there is a harvest of all shippable trees on the nursery. The three year old trees are lifted out of the ground, those not satisfying the grade because of height or other criteria are removed ("culled"), the rest are bundled and packed into bags and are then shipped out to planting operations in the northwest region of Ontario. In 1988 and for five years before, 80% of the spring harvest (that is, of black pine, spruce and other trees, except red pine) was performed by contractors, with MNR staff harvesting only the red pine. Two hundred employees are engaged in the spring harvest, of whom forty are employees of MNR and 160 are employees of the outside contractors. Last year for the first time there was another harvest, in the fall, when the trees were wintered in storage and not shipped out until the spring; the fall harvest was contracted out and was done by 100 employees. During the summer, the trees in the nursery are transplanted into larger beds conducive to their growth.

13. It is the summer transplanting which is the subject of this application. Before 1988, it was done exclusively by 135 MNR staff. In 1988, it has been done exclusively by 151 employees of Moose Creek, except for quality control which is carried out by ten seasonal staff of MNR. The decision to have the work performed by outside contractors resulted from the omission from the relevant budget of funds allocated to salaries and the inclusion of monies which could be expended only on a contract basis. The Crown invited bids for the summer work; one of the prerequisites of bidding was that the contractor had had harvesting or transplanting experience. William Skene, the principal of Moose Creek, had harvested trees in the Dryden nursery in the fall of 1987.

14. The contract between Moose Creek and the Crown covers the period between June 20, 1988 and July 13, 1988 and had been completed by the date of the hearing; it requires Moose Creek to lift trees in the nursery and to transplant seedling stock. Moose Creek supplied the employees and paid them rates determined by Moose Creek. Of the employees hired by Moose Creek, 34% had worked for MNR during the summer of 1987. Supervision of the employees is carried out by Moose Creek, but the Crown establishes specifications for the lifting and transplanting, the adherence to which is ensured by MNR's quality control employees. The specifications, set out

in Schedule 'A' to the contract, are detailed instructions on how the work is to be carried out; similarly, Schedule 'B' sets out in detail the manner in which "the Crown will assess the quality and the quantity of the transplanting and the lifting". The Crown provided equipment to Moose Creek pursuant to Schedule 'C'. For example, the Crown provided three 8-row transplanting machines at a rental of \$25.00 a day; such a machine is worth about \$50,000. Three tractors worth \$25,000 each were rented by the Crown to Moose Creek for \$50.00 a day. Effectively, all necessary equipment was provided by the Crown.

15. With respect to the question of whether they constitute an "undertaking" or part of an undertaking, we see no significant difference in the functions performed under the contract to Moose Creek from those performed under the contract from MNR to KBM in *KBM Forestry Consultants*, [1987] OLRB Rep. Mar. 399 (application for judicial review dismissed, April 25, 1988 [Div. Ct.]). The function in *KBM*, the harvesting of seedlings for transplanting, formed part of a reforestation program run by MNR. The function at issue in the contract to Moose Creek is the transplanting of trees which have already been harvested. The Board in *KBM* found that

the Crown is involved in a reforestation project or program, operating out of its Thunder Bay Forest Nursery, and as part of that project or program, it is necessary to harvest seedlings which will later be replanted. A portion of this harvesting, following upon the loosening of the soil and prior to the actual replanting, was, but is no longer, done by the Ministry; it is now done by KBM. The Ministry has transferred (or "disposed" of) that part of the project to KBM, although it retains an interest in ensuring that the work performed by KBM is performed in a manner consistent with the standards established by the Ministry for the reforestation program. That brings it squarely within ... the *Successor Rights (Crown Transfers) Act*.

In dismissing the application for judicial review of KBM, the Divisional Court stated:

In our view there can be, as in this case[,] a disposition of services effecting a transfer under S.2(1) of the Act. Such a transfer is consonant with the large range [of] governmental activity contemplated within the definition of "undertaking" in s.1[(1)](h) of the Act. The diversity of such activity goes beyond the concept of "business" as found in S.63 of the Ontario Labour Relations Act and accordingly the term "undertaking" as found in S.1[(1)]h of the Act should not be limited by analogy [to] S.63. In concluding that the reforestation herein [is a] "program project work [or] a part of any of them", the award was not patently unreasonable.

We conclude on the basis of the analysis by the Board in *KBM*, *supra*, that the contract from MNR to Moose Creek, which encompasses merely the next step of a similar program at the Dryden Nursery, constitutes a transfer of an undertaking within the meaning of the *Crown Transfers Act*.

IV

16. The contract between MNR and Luckasavitch involves the maintenance of facilities and day-to-day management of the Rock Lake and Coon Lake campgrounds and Rock Lake access point, the provision of information and the issuance of permits to users of the Park. The contract applies to the period May 17, 1988 to March 31, 1989, but the normal operating season for the campgrounds and Rock Lake access point is May 17 to Thanksgiving. The maintenance required, the completion of the permits and other aspects of the operation of the relevant areas are specifically delineated in Schedule "B" to the contract pursuant to MNR's requirements. Luckasavitch and his wife live at Rock Lake campground and perform the duties together in what was described by Mr. Smith as a "private arrangement"; Luckasavitch is free to hire employees, however.

17. In 1987, MNR performed these functions, hiring a person to collect fees for permits during July and August only at Rock Lake campground; from April 29 when the Park opened until the end of June, the system for issuing permits was "self-serve". There was also an honour system

at Coon Lake and Rock Lake access point. The MNR employee worked 10:00 a.m. until 6 p.m., 5 days a week, while, according to Mr. Smith, Luckasavitch is available twenty-four hours, seven days a week. Schedule "B" of the contract states that the minimum operating times from April 10th to October 10th are seven days a week, but the minimum hours are 9:00 a.m. to 4 p.m. from April 10th to June 22nd and from September 5th to October 10th and 8:30 a.m. to 9:00 p.m. from June 23rd to September 4th; it states further that "Extended hours of operation are at the discretion of the Concessionaire", Luckasavitch. We were given no evidence by Luckasavitch of when he does operate the office beyond the minimum hours. Thus while Mr. Smith's testimony suggests that the twenty-four hour availability was a factor in contracting the work, the contract does not impose such a condition. The contract between MNR and Luckasavitch is similar, according to Mr. Smith, to that relating to four of the other access points.

18. Because of the availability of Luckasavitch, counsel for the Crown argued that the tasks performed by him constitute a new "project", from which it follows that there could not have been a "transfer" of anything; however, in our view, Luckasavitch's contract with MNR merely requires that he perform the project (or set of functions comprising part of a larger project of running the Park) comprised of selling permits or providing information in a somewhat different manner than did the MNR employee who previously performed it, but it is essentially the same set of functions as performed by the MNR employee.

19. Counsel for the Crown argued further that the contract between Luckasavitch and the Crown merely entails the transfer of the opportunity to do work and therefore is not encompassed by the *Crown Transfers Act*. Counsel for the union argued strenuously, on the other hand, that the word "work" in clause 1(1)(h) of the Act refers to the performance of labour by the employees, rather than "a work" in the sense of an entity. He relies on *KBM Forestry Consultants, supra*, for that proposition; however, the Board in that case specifically declined to deal with the meaning of "work", as it was not necessary to do so, and its reference to "work" in paragraph 12 is a reference to a factor which the cases have recognized as an important consideration in deciding whether there has been a sale of a business, as is clear from paragraph 11 of the decision. While under section 63 the Board has been concerned with whether there has been a transfer of "a functional economic vehicle", and in that sense examines a variety of factors, such as whether there has been the transfer of a logo or of good will or of inventory, or whether the employees of the predecessor company work for the successor company or whether they are performing the same skills, it has also noted in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at para. 32, that

[o]f particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section [63] ... Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of work done is an important indicium of a transfer of a business.

[emphasis added]

It is in this context that the Board in *KBM Forestry Consultants Inc.*, *supra*, referred at para. 12 to there being "a continuation of work and jobs" in the transfer of the harvesting of seedlings from the Ministry of Natural Resources to KBM Forestry Consultants Inc.

20. The jurisprudence makes it clear that the transfer of work alone does not constitute a sale of a business or part of a business under section 63: *British American Bank Note Co.*

Ltd., [1979] OLRB Rep. Feb. 72, at para. 11 ("section [63] cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members"); *Metropolitan Parking Inc.*, *supra*, at paras. 36 ("The focus of section [63] is the business entity -- the employer's total economic organization -- not simply the work which the employees perform:"); 38 ("A transfer of work, by itself, is simply not enough to ground a section 55 finding.") and 44 ("The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so."); *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, at para. 33; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923.

21. We are of the view that the definition of "undertaking" in clause 1(1)(h) of the Act does not include the mere performance of labour in itself. Clause 1(1)(h) does not state that "undertaking" *includes* the enumerated words, but rather that it *means* those words and therefore is limited to them. Where the context does not suggest a contrary intention, given a list of terms in a definitional phrase, the terms should be interpreted with reference to each other (that is, as "of the same kind or nature" or *ejusdem generis*), as counsel for the Crown argues, rather than interpreting one of the terms, here the term "work", as if it were the only term of its own class in a list of terms of another class or classes (that is, "of its own particular kind" or *sui generis*). Furthermore, "work" is part of a list which is preceded by the indefinite article "a" and the most common sense reading of the clause is that "'undertaking' means a ... work or a part of [it]". We conclude that the term "work" does not refer in itself to the exertion of labour and that *in and by itself* the performance of labour does not constitute an undertaking.

22. As the Divisional Court indicated in *KBM*, *supra*, however, *the provision of services* may constitute an undertaking within the meaning of clause 1(1)(h) of the *Crown Transfers Act*. The provision of services is, of course, a function integral to modern governments and while it may be difficult to distinguish the provision of services from the performance of labour, in the government context, many programs are comprised in their physical manifestation of little more than the provision of services to the public. The *purpose* of such provision is nevertheless to carry out a government undertaking or part of an undertaking.

23. Thus under section 63, which is concerned with the private sector, the Board has been insistent on ensuring that more than the expenditure of energy or physical exertion be transferred from one entity to another in order for there to be a transfer of a business. It has held that if all that is transferred is the opportunity to do work, there is no transfer; there is no transfer, for example, if business A has contracted to business B the right to provide labour to carry out some purpose (such as providing personnel to help the predecessor employer run its hospitality portion of its business better: *The Charming Hostess Inc.*, *supra*, paras. 37 - 39). For that reason, the Board has spoken of the transfer of assets, goodwill, inventory, customer lists and other indicia of a thriving or once thriving business and has required that some of such indicia be present to find that a business has been transferred. In referring to a "part" of a business, the Board has not been willing to consider the exertion of labour as constituting a "part", but rather has interpreted "part" as a coherent and severable portion of a business, such as one of a chain of stores or a clearly identifiable department in a factory: *Metropolitan Parking Inc.*, *supra*, para. 33.

24. The distinction between "work" and a total business is less easy to make in the government context because of the nature of the undertakings carried on by government. While the purpose of section 63 and that of the *Crown Transfers Act* are analogous, it is not insignificant that the wording of the two provisions are not the same. The Legislature has explicitly recognized that the functions of government place it in the role of employer, but that as an employer it may be engaged in quite different sorts of interests than the private sector, even as it also may be engaged

in quite similar interests in form if not in substance; thus the provision of social assistance or of housing and the functions performed by employees in connection with such programs are fundamentally different than the usual private business and the functions carried out by its employees, but the running of a railway or of a bookshop will not outwardly be different whether carried on by a private employer or by government and can be characterised much more easily as a “business” than the provision of social assistance. Yet the provision of social assistance or of housing or the running of a railway or bookstore are all “undertakings” within the meaning of clause 1(1)(h) of the *Crown Transfers Act*.

25. In other words, while the purpose may be the same, the activities encompassed by the two provisions are not similar. Just as “business” and “undertaking” are neither conceptually nor in fact synonymous, the definition of “part” of an undertaking cannot be the same as that of “part” of a “business” but must take into account the different ways in which government carries out its functions and in which it acts as an employer. As “undertaking” is broader than “business”, so may “part” of an undertaking be broader than “part” of a business. The notion of a coherent and severable portion of a business, in the sense of one store of many, which is applicable under section 63, is not necessarily appropriately transferred to the *Crown Transfers Act*. A program or project may be comprised of several distinct functions which can be severed but which do not constitute anything resembling a microcosm of the whole. Thus the operation of Algonquin Park consists in providing services to the users of the Park which make the Park’s use possible in the first place or more enjoyable or complete, as well as services which enable the government to benefit from the operation of the Park, among other things. These activities are severable in the sense of being easily identifiable as distinct services, but they mean very little on their own and are not analogous to the manner in which the Board has generally defined “part” of a *business* under section 63. That does not make them any less “part” of the undertaking of operating the Park, however, since in reality the operation of the Park can be seen only as comprised of these different services or functions.

26. In our view, what has been transferred between the Crown and Lukasavitch is not merely the opportunity to perform work or engage in labour (although we note in passing that if all that has been transferred to Lukasavitch is the work, there may arise a question of Lukasavitch’s status vis-a-vis the Crown [that is, whether he is an agent of the Crown]: *Ministry of Natural Resources*, *supra*, para. 11). The contract with Lukasavitch is similar but not identical to the contract MNR had with Daniel Dolan and Henry Wilson (“the contractor”) in *The Ministry of Natural Resources*, [1986] OLRB Rep. Mar. 331, which involved selling permits, providing enforcement, maintaining facilities and selling firewood in Fitzroy Provincial Park. Under that contract MNR delivered to the contractor facilities and equipment which the contractor then delivered back to the MNR at the end of the contract, including park buildings and equipment such as office furniture, power tools, boat and tractor/front end loader, worth in total about \$410,000. The contract to Lukasavitch does not involve such a delivery of equipment and facilities although he has possession of a residence and office for which he has responsibility; he performs more limited or express functions in the sense that he does not “manage” the entire Park as Dolan and Wilson apparently managed the smaller Fitzroy Provincial Park. Counsel for the Crown says that since the contract with Lukasavitch does not transfer assets, that contract is to be distinguished from the one MNR made with Dolan and Wilson. The transfer of assets is not a requirement of a transfer under the *Crown Transfers Act*. The emphasis in *The Ministry of Natural Resources*, *supra*, on the delivery of assets was to distinguish the functions of Dolan and Wilson from the cases in which one respondent had contracted to supply and manage staff for another respondent. That issue does not arise in this case. The operation of the provincial parks is a program of the Ministry of Natural Resources and whether the tasks performed by Lukasavitch themselves constitute a “project” or other form of

undertaking, they do constitute part of an undertaking which has been transferred from the Crown to Luckasavitch.

V

27. With respect to the contract to Charmaine's, Mr. Smith explained that the majority of funds were budgeted for contract work since "the government is looking for alternative means of carrying out its responsibilities" and that "contracting out" has been followed in other provincial parks and it was considered it should also be followed in Algonquin Park. The Crown let out a tender for janitorial services and put an advertisement in newspapers. As the second lowest bidder, Charmaine's was approached when the lowest bidder withdrew two weeks before the start of the contract. The contract between MNR and Charmaine's, covering the period April 29, 1988 to October 10, 1988, gives a detailed description of the work to be performed in Schedule "A". Schedule "B" is a list of the frequency, by specific days (unless "daily") of when various facilities are to be cleaned during specific periods during the summer. These facilities are located along the Highway 60 corridor through the Park. Charmaine's provides the cleaning equipment and supplies, hires, pays and supervises the five adults and one student employed by it, establishes the wage rates and organizes the work to conform to the contractual format. Private contractors provide janitorial services at eleven of the twenty-nine access points in the Park and such contracts have been in effect over the last five years. In 1988, no employees of MNR do janitorial services except the staff at their own offices and at gatehouses. In 1987, however, the work done at the campgrounds along Highway 60 which are the subject of this application, was done by seasonal staff of the MNR; three of those seven employees are now working for Charmaine's.

28. Charmaine's has contracted with the Crown to provide cleaning services in a particular portion of Algonquin Park. Counsel for the Crown argued that this was merely the transfer of work. On the analysis in paragraphs 21-25 above we reject that submission. The provision of such services, without which the operation of the Park would be undermined, constitutes part of the undertaking carried on by MNR known as Algonquin Park and is therefore encompassed by clause 1(1)(h) of the *Crown Transfers Act*.

VI

29. We declare that there has been a transfer to Moose Creek Forestry of the undertaking or part of an undertaking encompassed by the contract between the Crown and Moose Creek Forestry and that Moose Creek Forestry is bound by the collective agreement between the Crown and OPSEU.

30. We further declare that there has been a transfer to Luckasavitch of the undertaking or part of an undertaking encompassed by the contract between the Minister of Natural Resources and Luckasavitch and that Luckasavitch is bound by the collective agreement entered into by the Crown and OPSEU.

31. We further declare that there has been a transfer to Charmaine's of part of an undertaking encompassed by the contract between the Minister of Natural Resources and Charmaine's and that Charmaine's is bound by the collective agreement entered into by the Crown and OPSEU.

0804-88-R Brewery, Malt & Soft Drink Workers, Local 304, Applicant v. Cooper Canada Limited, Respondent v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 366, Intervener

Certification - Representation Vote - Vote ordered and ballot box sealed - Union seeking leave to withdraw its application after the vote is held but before it is counted - Employees requesting that vote be counted - Board outlining role and interest of employees in a certification application - Board cannot insist that union pursue a certification application - Vote not counted - Application dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

DECISION OF THE BOARD; September 14, 1988

1. By decision dated August 4, 1988, the Board directed the taking of a pre-hearing representation vote in this application for certification and further directed that the ballot box remain sealed until further order of the Board. The vote was taken on August 23, 1988.
2. By letter dated September 12, 1988, the applicant sought leave of the Board to withdraw its application. The intervener, by letter dated September 12, 1988, consented to the withdrawal and further stated that it "join[ed] with the Applicant in requesting the Board to grant the applicant leave to withdraw. The respondent has not indicated its position on the matter.
3. A group of employees, however, wrote to the Board on September 12, 1988, requesting the Board to determine the application on its merits. The letter reads as follows:

We have been informed that the Brewers Local 304 are going to ask the Board for permission to withdraw their application for certification for Cooper Canada Ltd., Board File #0804-88-R.

We are employees of Cooper Canada and speak for the vast majority of the employees. We strongly request that you not grant the Applicant's request for withdrawal and instead deal with the merits, and certify the Union chosen by the majority of the Cooper employees.

On August 23, 1988, employees of Cooper voted in a secret ballot vote the [sic] was ordered and conducted by the Board, and we made a choice as to which Union we wanted to represent us.

We understand that because of political reasons having to do with the internal rules of the Canadian Labour Congress, the Applicant has been forced against its wishes to withdraw its Application.

We think that we have rights too and that the policy of the Labour Relations Act is that the majority of the employees have the right to choose. We have voted. We have chosen. We urge the Board to go ahead with the hearing on September 22nd, 1988, open the ballot boxes, and certify whichever Union is chosen by the majority.

4. Pursuant to Rule 70(2) of the Board's Rules of Practice the employees who are the subject of or have an interest in a pre-hearing representation vote application have an opportunity to make representations "in connection with the application or as to any matter relating to the representation vote or the accuracy of the report of the Returning Officer or the conclusions the Board should reach in view of the report". Where the Board has directed that the ballot box be sealed and then directed the vote be counted, the employees may make representations with respect to "the accuracy of the report of the Returning Officer on the counting of the ballots or the conclusions the Board should reach in view of the report", in accordance with Rule 70(3).

5. It is one thing to participate in a certification application, however, and another to influence whether the application is extant. Under the *Labour Relations Act* ("the Act"), only trade unions may apply for certification as bargaining agent of the employees in a particular unit (in a pre-hearing vote context, where the status of the applicant is in issue, the determination of whether the applicant is a trade union within the meaning of clause 1(1)(p) of the Act will likely be made after the vote has been taken, but before it has been counted; however, that is not an issue in this case). The employees may not apply for certification, however, even though they may participate in a certification proceeding before the Board. The scheme of the Act (with the exception of applications under section 8 which is not relevant here) is, as the group of employees state, that "the majority of the employees have the right to choose". Thus while the Board may order a vote where the union applicant has documentary evidence that fewer than half the relevant employees are its members, it will not certify a union unless more than half the employees vote in favour of the applicant or more than fifty-five per cent of the employees in the bargaining unit are members of the union.

6. The Board will not, in other words, certify a union against the expressed will of the majority (in this respect, it should be noted that the theory underlying section 8 is that the will of the majority cannot be determined because of the conduct of the employer). But the Board cannot compel a union to make an application for certification should it not desire to do so, no matter how many employees want the union to do so. No more can the Board, then, insist that a union pursue an application it no longer wishes to pursue for whatever reason (and we note the applicant did not state its reason for wanting to withdraw) for the sole reason that the employees affected by the application wish it to continue and be determined on its merits.

7. For those reasons we are not prepared to accede to the request by the employees that we count the vote and certify the union chosen by the majority.

8. With respect to the applicant's request to withdraw its application, we note that the employer has not consented to the request and that the request has come not only after a Labour Relations Officer has met with the parties, but after the vote has been directed and taken. Accordingly, the request is denied.

9. This application is therefore dismissed.

10. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

11. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

12. After this decision had been made, but prior to its release, a letter dated September 14, 1988, from the solicitor for James Sheridan, one of the employees who had signed the letter of September 12th referred to in paragraph 3 above, was received by the Board. Nothing in that letter leads us to dispose of this matter other than as set out above. The letter in addition to submissions with respect to the applicant's request to withdraw its application, also contained a request for reconsideration of the Board's decision in Board File No. 0567-88-R granting Mr. Sheridan leave to withdraw an application for decertification which he had filed. This panel did not determine that matter and therefore cannot reconsider it.

1194-88-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Dowty Canada Electronics Limited, Respondent

Bargaining Unit - Certification - Representation Vote - Union asking for exclusion of professional engineers from bargaining unit - Union in a vote position regardless of exclusion - Two votes ordered - Ballots of engineers to be segregated in one vote - In other vote engineers asked whether they wish to be included in unit with other employees

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *B. L. Armstrong* and *R. M. Sloan*.

DECISION OF THE BOARD; September 22, 1988

1. This is an application for certification in which the parties have reached agreement on all matters in dispute, with the exception of the matters described below, and consented to the Board issuing a decision in this matter without a formal hearing before a panel of the Board.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are in partial agreement concerning the description and composition of the bargaining unit. The language to which they have agreed is:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

The applicant contends that "professional engineers" should also be excluded from the bargaining unit. It is the respondent's position that "professional engineers" should not be excluded from the bargaining unit in that they (allegedly) share a community of interest with the other employees in the bargaining unit.

4. The Board is satisfied that regardless of whether the respondents' professional engineers are included in or excluded from the bargaining unit, not less than forty-five per cent (and not more than fifty-five per cent) of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 30, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Accordingly, pursuant to section 7(2) of the Act, the Board directs that a representation vote be taken in respect of the following bargaining unit:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

5. All those employed in the bargaining unit on September 9, 1988, who are so employed on the date the vote is taken will be eligible to vote.
6. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
7. In view of the parties' disagreement with respect to professional engineers, the Board

directs that any ballots cast in the representation vote by professional engineers be segregated pending further direction by the Board, unless otherwise agreed by the parties.

8. The following persons, whose inclusion on the voters list has been challenged by the respondent (on the basis that they are on indefinite lay-off), shall be permitted to cast ballots in the representation vote, but their ballots shall also be segregated pending further direction by the Board, unless otherwise agreed by the parties: Joanne Murphy and Carmel O'Brien.

9. Section 6(4) of the Act provides as follows:

A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of such professional engineers wish to be included in such bargaining unit.

Having regard to that provision and to the agreement of the parties, the Board directs that a vote be conducted, concurrently with the aforementioned representation vote, to determine whether or not a majority of the respondent's professional engineers wish to be included in the aforementioned bargaining unit with other employees of the respondent. The professional engineers concerned will be asked to indicate whether or not they wish to be included in the following bargaining unit with other employees of the respondent:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

10. The matter is referred to the Registrar.

0925-88-R United Steelworkers of America, Applicant v. Durso Steel Limited, Respondent, v. Group of Employees, Objectors

Certification - Petition - Timeliness - Petition left on deserted desk at Board offices after office hours on terminal date not "received" by Board in accordance with Rules - Petition untimely - Certificate issuing

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald*.

APPEARANCES: *P. Turtle* and *P. Falbo* for the applicant; *Carl Peterson* and *Joe D'Urso* for the respondent; *D. Hutchinson* and *I. Mohamed* for the objectors.

DECISION OF THE BOARD; September 9, 1988

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the City of Brampton, save and except forepersons, persons above the

rank of foreperson, office, clerical and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 29, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. There was delivered to the Board offices a statement in opposition to the application signed by six employees in the bargaining unit. The statement was date-stamped as having been received by the Board on Tuesday, August 2, 1988. On August 3, 1988 the Registrar wrote to a representative of the group of employees advising him that the statement appeared to have delivered to the Board after the July 29, 1988 terminal date fixed for the application. Representatives of the group of employees attended at the hearing, however, and contended that the statement had in fact been delivered to the Board's offices on Friday, July 29th.

6. The Board's offices close at 5:00 p.m. At the hearing, employee Dalton Hutchinson indicated that the following events occurred on July 29, 1988. Mr. Hutchinson attended at 400 University Avenue in Toronto, the building which houses the Board's offices, at about 5:30 p.m. He had with him the statement in opposition to the application. Mr. Hutchinson was stopped in the lobby of the building by a security guard. Mr. Hutchinson indicated to the security guard that he wished to deliver a letter to the Board. The security guard replied that the Board's offices were closed and accordingly he could not do so. Mr. Hutchinson then proposed that the security guard accompany him to the Board's offices while he dropped off some material. The security guard agreed with this proposal and accompanied Mr. Hutchinson to the receptionist's desk at the entrance to the Board's offices on the fourth floor of the building. No one was at the desk. Mr. Hutchinson left an envelope containing the statement on the desk, and then departed.

7. As already noted, the envelope containing the statement in opposition to the application for certification was date-stamped Tuesday, August 2, 1988. Monday, August 1st, was the Civic Holiday, a day the Board's offices were closed. Presumably the envelope was discovered by one of the Board's staff on August 2, 1988 and then date-stamped.

8. At the hearing, the issue was raised as to whether or not Phil Falbo, a full-time union organizer, had advised employees that they had until midnight on the terminal date to file a statement in opposition to the union. Employee Imtiaz Mohamed testified that Mr. Falbo had made such a statement to those employees who attended a union meeting held on or about July 18, 1988. Mr. Falbo denied making such a statement. It was his evidence that at the July 18th union meeting he was asked if union supporters could continue to get other employees to sign union cards, to which he replied that they could continue to do so since the union had until the terminal date to file any cards with the Board. Mr. Falbo denied giving any advice at the meeting concerning the filing of a document in opposition to the union. He testified that what he said was that employees should keep their eyes out for a petition and if they saw one being circulated they should keep notes about it.

9. Having considered the conflicting evidence of Mr. Falbo and Mr. Mohamed, we are led to conclude that Mr. Falbo's version of what he said at the union meeting is likely the more accurate. In this regard, it seems unlikely that Mr. Falbo, a union organizer, would offer advice to employees concerning the procedure for filing a statement in opposition to the union's application for certification. It makes more sense that he would have told employees who attended the union meeting that they should make notes about the circulation of any such document. It may well be

that Mr. Mohamed subsequently learned of the procedure for filing a statement in opposition to the application from one of the Board notices and assumed that employees had until midnight on July 29th to file such a document.

10. As with union membership evidence, a statement in opposition to a certification application must be filed with the Board by the terminal date. This is provided for by Rule 73(1) which reads, in part, as follows:

Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence ...

(b) is filed not later than the terminal date for the application.

11. Rule 75(1) deals with the issue of when a document is deemed to have been filed with the Board. It provides as follows:

Where a document is required to be filed by these Rules, filing shall be deemed to be made,

- (a) at the time it is received by the Board; or
- (b) where it is mailed by registered mail addressed to the Board at its office ... at the time it is mailed.

12. The requirement that any statement in opposition to the certification application be mailed registered mail or received by the Board by the terminal date, was made known to employees by way of the posting of a Form 6 "Notice to Employees of Application for Certification and of Hearing", which stated as follows:

3. The Board has fixed Friday, the 29th day of July, 1988, as the **TERMINAL DATE** for this application.

4.(1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.

(2) A document referred to in subsection (1),

- (a) must be signed by the objecting employee or employees;
- (b) must be,
 - (i) received by the terminal date if sent other than by registered mail, or
 - (ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail;

...

No oral evidence of employee objection to certification of the applicant will be accepted by the Board except to identify and substantiate written evidence which complies with these requirements.

13. As already noted, the terminal date is the cut-off point by which a union must file its membership evidence with the Board and employees must file any statement indicating that they no longer support the union. The Board also requires that any "revocations" or "counter-peti-

tions” by employees indicating that they wish to withdraw their names from a statement in opposition to a union be filed by the terminal date. Given the importance of a final cut-off point for the filing of such material, the Board has consistently declined to accept material relating to employee support for or opposition to a union filed subsequent to the terminal date. See: *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183. The Board made the following comments with respect to this issue in *The Westin Hotel* case, [1986] OLRB Rep. Oct. 1486:

13. ... It is our view that the terminal date, and Rules relating to it, are not technical matters. Furthermore, the need for clear rules and their consistent application requires the Board to make it clear to parties when their documents will be considered filed and when all evidence must reach the Board. The question of the appropriate terminal date is not equivalent to the failure to name the employer on a petition or the failure to designate the section under which a complaint has been made, situations in which amendments are permitted; rather, as pointed out above, it addresses a matter of significance in labour relations: the date at which all parties can be satisfied all evidence must be filed if it is to be considered by the Board.

14. Rule 75(1) provides that a document shall be deemed to be filed “at the time it is received by the Board”. A document left on a deserted desk at the Board’s offices after office hours cannot reasonably be said to have been “received” by the Board. Rather, a document is received by the Board only when it comes into the hands of a person authorized by the Board to receive material on its behalf. In the instant case, the relevant document was received by the Board when it came into the possession of a member of the Board’s staff on Tuesday, August 2, 1988. This being the case, we are satisfied that the document in question was not filed by the terminal date, and hence does not meet the filing requirements of Rule 73(1). Accordingly, the document will not be given any weight.

15. A certificate will issue to the applicant.

0648-88-M Ontario Public Service Employees’ Union, Applicant v. Fleetwood Ambulance Services, Respondent

Employee Reference - Agreement during certification hearing in 1980 that individuals exercised managerial duties - Previous agreement not forever barring s.106(2) application - Agreement merely a relevant evidentiary matter - Officer appointed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

DECISION OF THE BOARD; September 28, 1988

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant is seeking a determination as to whether five named individuals are “employees” within the meaning of the Act. Those persons are: Barry Duff, Ian Douglas, Doug Vanderveer, Doug Mansell and David Henry, all classified as supervisors by the respondent.

2. In *The Windsor Star*, [1988] OLRB Rep. April 427 at paragraph 14, the Board outlined the information which thenceforth would be required in section 106(2) applications:

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Offi-

cer with respect to the duties and responsibilities of the person(s) in dispute to “changes” in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties’ agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a “question” has arisen as to the “employee” or “guard” status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual’s status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person’s status, the Board will not permit evidence as to the person’s duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board’s opinion, this policy does not undermine agreements of the parties as to the person’s status and avoids repeated or frivolous examinations, yet provides sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

3. When an application under section 106(2) is received, the Registrar acknowledges the application, directs the applicant’s attention to the relevant passages in *The Windsor Star* decision, *supra*, and establishes a deadline for receipt of the required information. The applicant’s materials are circulated to the respondent for reply by a specified date and the respondent, as well, is directed to the relevant excerpt from *The Windsor Star, supra*. Finally, the respondent’s reply, if any, is circulated to the applicant for comments, again, with a deadline established. The Board considers the material filed and, in the context of the principles set out *The Windsor Star, supra* (paragraphs 8 to 15 in particular), either appoints a Board Officer to conduct a duties and responsibilities examination of the person(s) in dispute or declines to do so.

4. The applicant, in its material filed with the Board, outlined its view of the history of the positions and the duties of the incumbents. The respondent opposed an examination of those named persons on the basis that the applicant has failed to demonstrate the “mischief” against which section 1(3)(b) is directed. Further, the respondent contended that, in respect of two of the persons (Barry Duff and Doug Vanderveer), there is a specific agreement or Board determination that both exercise managerial authority dating from the applicant’s certification in 1980 when those two (amongst others no longer holding the position of supervisor) were excluded from the bargaining unit.

5. In *The Windsor Star, supra*, the Board indicated (in the passage quoted above) that “where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person’s status, the Board will not permit evidence as to the person’s duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased”. This approach seeks to balance the interest in upholding prior agreements of the parties and avoiding repeated or frivolous examinations against the need for flexibility to adequately respond to circumstances where the mischief noted has arisen or ceased.

6. Having regard to the material filed, the Board in the instant case is satisfied that a

“question” exists between the parties as to the “employee” status of the five named persons and the mischief against which section 1(3)(b) is directed may well have ceased. This application is the first in respect of the disputed individuals (or the previous incumbents) since certification in 1980. Thus, the application cannot be regarded, on its face, as frivolous or a repeated raising of the issue. Moreover, the applicant submitted that the question was raised during the last round of negotiations and that the union reserved the right to seek a 106(2) determination. The respondent did not dispute that assertion. The decision in *The Windsor Star*, *supra*, established informational requirements before the Board would decide whether a “question” had, in fact, arisen between the parties and direct an examination of the duties and responsibilities. As well, *The Windsor Star*, *supra*, rejected the artificiality of focusing on the timing of the application as a vehicle for directing a “full” examination or one restricted to “changes”. That is, where a Board Officer is appointed, a full duties and responsibilities examination is conducted and the question of “changes” moves to an evidentiary matter where the *status quo*, the duties and responsibilities of the disputed individual(s) (including any changes thereto) and the historical context become matters of evidence to be given the appropriate weight in each case. In the Board’s view, in the circumstances, the previous agreement does not operate to preclude forever a section 106(2) application where, as here, the material, on its face, appears to indicate that the mischief has ceased. Rather, that agreement and the historical context at the time of certification and subsequently are relevant evidentiary matters in addition to the current duties and responsibilities of the persons in dispute.

7. Having regard to the material filed and the principles enunciated *The Windsor Star*, *supra*, the Board is satisfied that a “question” exists between the parties as to the “employee” status of the individuals in dispute. Accordingly, a Board Officer is hereby appointed to inquire into the duties and responsibilities of the five individuals named in paragraph 1 above.

8. This matter is referred to the Registrar in accordance with the foregoing.

3112-87-R Ontario Catholic Occasional Teachers’ Association, Applicant v. Frontenac-Lennox and Addington County Roman Catholic Separate School Board, Respondent

Bargaining Unit - Certification - Membership Evidence - School Boards and Teachers Collective Negotiations Act - Membership evidence mailed to union office with dollar meeting requirements of Act - Whether Part XI occasional teachers who teach in the French language should be excluded from a unit of occasional teachers who provide instruction in English - Cases indicating that either all-inclusive unit or separate unit of Part XI occasional teachers appropriate - Sufficient community of interest for all-inclusive unit here

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *Bernard Hanson*, *Ray Fredette* and *Anthony Burke* for the applicant; *Mary Beth Currie*, *Raymond Doyle* and *Madelaine Murphy* for the respondent.

DECISION OF THE BOARD; September 14, 1988

1. This is an application for certification in which the applicant requested that a pre-hear-

ing representation vote be taken. The parties are in dispute with respect to the description of the appropriate bargaining unit. The applicant proposed the following alternative descriptions:

All occasional teachers of the respondent in the Counties of Frontenac, Lennox and Addington,

or

all occasional teachers employed by the respondent in the Counties of Frontenac, Lennox and Addington, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

Clarity Note:

“Occasional teacher” has the meaning assigned to it by clause 1(1)31 of the *Education Act*.

The respondent takes the position that the following constitutes an appropriate bargaining unit:

All occasional teachers employed by the respondent in its schools in the Counties of Frontenac, Lennox and Addington, save and except those employees teaching in schools pursuant to Part XI of the *Education Act*, and employees in any bargaining unit for which a trade union held bargaining rights as of February 17, 1988.

2. To ensure that the results of the vote would be useful in any event of this dispute, the Board directed that a pre-hearing representation vote be taken of the employees in the following voting constituency:

All occasional teachers employed by the respondent in the Counties of Frontenac, Lennox and Addington, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

Clarity Note:

“Occasional teacher” has the meaning assigned to it by clause 1(1)31 of the *Education Act*.

The Board then ordered that the ballots of Part XI teachers be segregated and not counted pending the resolution of this issue. In addition, since the respondent had also alleged that a portion of the membership evidence collected in this matter was defective, the ballot box was sealed and the ballots remain uncounted at this time. The matter was then set down for a hearing.

3. At the hearing, the Board decided to proceed with the allegations with respect to membership evidence first. The parties were able to agree on the following facts, and then made their submissions on the basis of those facts. The membership cards were distributed to teachers either in person or through the mail from the union office. A number of them were returned by mail to the union office together with the sum of one dollar each. Ray Fredette, the Form 9 signatory and an executive assistant of the union, was given the letters by office staff at which point he telephoned each applicant and confirmed that the application had been completed by that person in the manner indicated on the card, and that they had enclosed one dollar. He verified that the indi-

vidual in question had indeed signed the card and that the payment had been made by them. If all these questions were answered in the affirmative, Mr. Fredette signed as the collector on the cards, recorded the date, issued a receipt and a duplicate membership card and sent the last two items to the new member. Where the one dollar payment took the form of a cheque, those cheques were cashed. The manner of collecting the cards was disclosed in a schedule attached to the Form 9 filed by Mr. Fredette together with a list of the names and telephone numbers of employees involved.

4. On the basis of these facts, the respondent argued that this method of collection could lead to uncertainty and abuse and that the Board should decline to accept the membership evidence obtained in this manner. The applicant pointed out that the Board had accepted this kind of membership evidence in *E.B. Eddy Products Limited*, [1977] OLRB Rep. Oct. 694; *Cooper-Weeks Limited*, [1970] OLRB Rep. Jan. 1221; *Photomat Canada Limited*, [1979] OLRB Rep. April 306; and *Canadian Gypsum Company Limited*, [1961] OLRB Rep. Nov. 280 and argued that any change in the Board's practice should not operate retrospectively.

5. The Board delivered the following oral decision:

Having carefully considered the submissions of the parties, we find that the membership evidence submitted in this matter meets the requirements of the *Labour Relations Act* and the Board's jurisprudence.

The Board then turned to the bargaining unit dispute. After hearing the parties' evidence and submissions, the Board reserved its decision.

6. The essence of this dispute is that the applicant asserts that Part XI occasional teachers, who teach in the French language, should be included in a bargaining unit with occasional teachers who provide instruction in the English language. The respondent takes the position that these two groups do not share a community of interest and that Part XI occasional teachers should be excluded from the bargaining unit.

7. In this connection, the Board heard the evidence of Raymond Doyle, Director of Education and Chief Executive Officer for the respondent. The respondent operates twenty-one English language schools and two French language schools, one of which is located on part of the premises of an English language school. Student eligibility for the French language schools is limited by certain criteria. At the present time, there is a three member French language education counsel which forms part of the Board of Education proper, whose members have been selected through a quasi-election process by the parents of those students eligible for French language instruction. Eventually, the respondent will have a number of French language trustees who will have particular responsibility for the French language schools. Most matters dealt with by the respondent are within the common jurisdiction of the English and French trustees. However, the *Education Act*, R.S.O. 1980, c. 129 as amended appears to contemplate some separation of responsibility under section 277(m), which among other things provides as follows:

- (1) The following matters are within the exclusive jurisdiction of the French-language section of a Board:

10. The recruitment and assignment of teachers and administrative and supervisory personnel for French language instructional units.

The recruitment and assignment of Part XI teachers is essentially the same as that for other occasional teachers except that advertising is placed in French language newspapers rather than English

language newspapers. All vacancies are posted in both groups of schools. At the moment the two French language schools are supervised by a supervisory officer who also supervises English language schools. However, the respondent is recruiting a supervisory officer for the French language schools who will also perform other administrative duties not specific to the French schools. All supervisory officers report to the Director of Education.

8. Part XI occasional teachers are licensed to teach in the French language whereas other occasional teachers are licensed to teach in the English language. Their training is essentially the same aside from the fact that it is carried out in different languages. It appears that only four out of eighteen Part XI occasional teachers hold the appropriate teaching licences. The remainder are unlicensed people who have been recruited from the francophone parent community. There appears to be very little interchange in work assignments between Part XI and other occasional teachers. It is rare that a teacher would hold licences to teach in both languages, and while it is possible that a teacher licensed to teach in the English language could teach in one of the French schools and vice versa, it appears to be an unusual occurrence.

9. Teachers employed by the respondent other than occasional teachers are covered by the *School Boards and Teachers Collective Negotiations Act*, 1975, R.S.O., 1980, c. 464 - ("Bill 100") rather than the *Labour Relations Act*. (Occasional teachers are excluded from the ambit of Bill 100 and fall within this Board's jurisdiction). Bill 100 teachers are divided into English instruction and French instruction bargaining units by virtue of the Bill, which sets out an elaborate scheme of representation based in part upon gender, religion and language. However, French language and English language teachers are permitted to bargain jointly, and those employed by this respondent have in fact bargained jointly for the last ten years. They are covered by one collective agreement resulting from those sets of negotiations.

10. There is also another bargaining unit for all remaining non-teaching staff and education assistants represented by the Canadian Union of Public Employees Local 1479. That unit includes staff working with both French and English language schools, and it is covered by one collective agreement. The respondent itself is one corporate entity. There is also no distinction between non-teaching personnel in the respondent's central offices relating to French and English language schools and no division of personnel into Part XI and non-Part XI functions. Each school has some of its own administrative staff located on the premises. French and English language schools have separate lines in the respondent's budget.

11. For the most part, the respondent appears to have established policies with respect to the setting of terms and working conditions, hours of work, wages and benefits for all occasional teachers regardless of the language in which they teach. Neither is there any difference in the wages, benefits and working conditions between Part XI and non-Part XI teachers covered by Bill 100.

12. On the basis of these facts, the respondent argued, among other things, that Part XI occasional teachers do not share a community of interest with other occasional teachers, that the *Education Act* recognizes the unique status and needs of the French language community, and that the occasional teachers' bargaining units should mirror those of the Bill 100 teachers. In support of its position, counsel for the respondent referred to *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090, in which the Board found that a bargaining unit consisting of only Part XI occasional teachers was appropriate for collective bargaining.

13. The applicant argued that the work of the occasional teachers was essentially identical and that there was no question that the larger bargaining unit was viable given the experience of Bill 100 teachers employed by the respondent, and the CUPE bargaining unit. The applicant

asserted that it was not the practice of the Board to mirror the bargaining structure of Bill 100, and that on the basis of the Board's jurisprudence, either an all-occasional teacher bargaining unit or separate bargaining units for Part XI and other occasional teachers would be appropriate. In these circumstances, the applicant referred to the Board's test in *The Hospital For Sick Children*, [1985] OLRB Rep. Feb. 266 and argued that the evidence in this case points to that test having been met. In support of this view, the applicant refers to *Sault Ste. Marie District Roman Catholic Separate School Board*, [1988] OLRB Rep. Jan. 91 in which the Board found that a bargaining unit which included both Part XI and other occasional teachers was appropriate.

14. The Board has been accorded a broad discretion under section 6 of the *Labour Relations Act* to shape units of employees appropriate for collective bargaining. In *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 the Board observed that there may be more than one appropriate bargaining unit and that this is not an area of labour relations amenable to exactitude or precision:

The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi - plant unit.

15. The Board has also said that it is not necessary for the bargaining unit to be the *most* appropriate unit, so long as it represents *an* appropriate unit (*Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481; *University of Windsor*, [1983] OLRB Rep. Mar. 478). In *Hospital for Sick Children*, *supra*, the Board posed the following formula:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

16. This case provides a good example of the proposition that there may be more than one appropriate bargaining unit configuration. In *Le Conseil Scolaire d'Ottawa*, *supra*, the applicant union had applied for a bargaining unit consisting of only Part XI occasional teachers. After reviewing the structure in the education sector and the particular facts before it, the Board found the applicant's proposed unit to be appropriate. In contrast, in *Sault Ste. Marie District Roman Catholic Separate School Board*, *supra*, the applicant had applied for a unit which included both Part XI and other occasional teachers. The employer sought to exclude Part XI teachers from the bargaining unit and referred to *Le Conseil Scolaire d'Ottawa*, *supra*. The Board commented on that decision as follows:

The employer relies on the decision of the Board in *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090. In that case, *L'Association des Enseignantes et Enseignants Suppléants* sought to represent a bargaining unit comprising the occasional teachers working in the respondent employer's six French language secondary schools established pursuant to Part XI of the *Education Act*, and the Board determined that this employee grouping constituted a unit of employees appropriate for collective bargaining. *It is important to note, however, that the Board in that case did not find that a broader-based bargaining unit encompassing all occasional teachers would be inappropriate; moreover, it would appear that in other cases, involving other school boards, the Board has, for collective bargaining purposes, grouped occasional teaching in Part XI*

programs together with their professional peers. There is no evidence before us of any labour relations problems arising from either determination.

[emphasis added]

After reviewing the facts before it, the Board found that the unit applied for met the test set out in *The Hospital for Sick Children, supra*, and determined that an all-inclusive occasional teacher unit was appropriate. It is also apparent from the decision that there was only one Part XI occasional teacher in that case, and that the effect of excluding her would have been to deprive her of the opportunity for collective bargaining.

17. We read these cases together as standing for the proposition that either bargaining unit structure may be appropriate, and that much depends on the circumstances of the case. As a result, we find it useful to turn to the facts before us in considering the formula set out in *Hospital for Sick Children, supra*. In this case, while there are some differences between Part XI and other occasional teachers, it is evident that they have far more in common. Given the similarities in their work, their working conditions and their employment structure, it is difficult to say that they do not share a sufficiently coherent community of interest that they can bargain together. Such a conclusion would have to be based largely on the fact that they teach in different languages, a proposition which does not strike us as self-evident and one which is not supported by any evidence in this case. In fact, non-Part XI occasional teachers already include those who teach the subject of French in the English schools. In this regard, we draw as well on the experience of the parties with Bill 100 Part XI and non-Part XI teachers which indicates that bargaining together has apparently been a satisfactory arrangement for many years. We note too that Part XI occasional teachers were given notice of this application along with the other occasional teachers, and none have come forward to object to their inclusion in the bargaining unit.

18. It was not suggested that the inclusion of Part XI occasional teachers would cause serious labour relations problems for the respondent. Whatever inconveniences there may be will be more than balanced out by the advantage to the respondent of an unfragmented bargaining structure. This is particularly true where the administrative structure for Part XI schools is still developing and there is more flexibility than might otherwise be the case. We note as well that an all-inclusive occasional teacher unit is more consistent with the respondent's existing bargaining arrangements.

19. Finally, we are not convinced that we should mirror the bargaining structure set out in Bill 100 in this case. As the Board noted in *Le Conseil Scolaire d'Ottawa*, that legislation gives institutional recognition to factors such as religion, language, ethnicity and gender which are quite foreign to the private sector and other public sector labour relations and, we would add in this case, quite foreign to the Board's criteria for bargaining unit determinations. While we do not rule out the possibility that the general bargaining structure imposed on the education sector may be relevant to occasional teacher bargaining units, there was nothing in this case which would indicate that it should provide a blueprint for the bargaining unit before us.

20. As a result we conclude that the bargaining unit proposed by the applicant encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without causing serious labour relations problems for the respondent. In these circumstances, we find that the following constitutes a unit of employees appropriate for collective bargaining:

All occasional teachers of the respondent in the Counties of Frontenac, Lennox and Addington.

21. We therefore direct that the segregated ballots be intermingled with the other ballots and that all the ballots be counted.

22. This matter is referred to the Registrar.

CONCURRENCE OF BOARD MEMBER JAMES A. RONSON; September 14, 1988

1. On the basis of the evidence before us I concur with my colleagues in finding that the Part XI occasional teachers employed by the respondent do not have a separate and distinct community of interest from their English teaching counterparts.

2. However, I do have some reservations. The Board must remain cognizant of the turmoil that took place in various areas of the province, resulting in the enactment of Part XI of the *Education Act*. The wording of Part XI clearly indicates that the Legislature recognized the problems particular to the "English-French Fact" in this province.

3. It is interesting to note that the respondent employer does not use "licensed English language teachers" who are bilingual to teach in the French schools on an occasional basis, but rather has permission to use unlicensed laymen from the French community. To me this says a lot about the nature of the issue that we are dealing with here.

4. There is a strong temptation to let this group of teachers decide the issue themselves. This could be done easily by counting their segregated ballots obtained at the pre-hearing vote. But the evidence simply does not disclose any serious labour relations problems for the employer that would justify the Board departing from its usual approach to the issue.

3294-87-R London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant v. Grace Villa Chronic Care Hospital, Respondent v. Group of Employees, Objectors

Certification - Petition - Six separately-written letters revoking membership in union by persons who subsequently signed the petition - Little evidence concerning these letters - Board considering it relevant, appropriate and proper to consider these documents - At least one letter linking employee's perception of job security to support of union's application - Cumulative factors causing Board to doubt voluntariness of petition

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. W. Murray* and *E. G. Theobald*.

APPEARANCES: *Randy Levinson*, *Kirsten Bradley* and *Jack Nicholls* for the applicant; *Edward V. Johnson*, *Charles Micallef* and *Virginia Murphy* for the respondent; *J. H. McNair* and *John Pethick* for the objectors.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR, AND BOARD MEMBER E. G. THEOBALD; September 12, 1988

1. This is an application for certification in which the parties met with a Labour Relations Officer on the day scheduled for hearing of this matter and reached a partial agreement on the

issues in dispute. The parties were unable to agree on the inclusion or exclusion of maintenance employees in the description of the bargaining unit. In addition, there were challenges to the list. The applicant took the position that Mr. John Pethick, Physiotherapy Aide, ought to be excluded from the bargaining unit by reason of the bargaining unit description and the fact that his community of interest lies with the paramedical unit. The respondent took the position that Mr. Ken Surette, maintenance, should be excluded from the bargaining unit since he exercises managerial functions within the meaning of section 1(3)(b) of the Act, or that he is employed in a confidential capacity in matters relating to labour relations. The respondent's alternative position is that maintenance employees do not have a community of interest with the bargaining unit members and should be excluded.

2. Seven statements of desire were filed with the Board containing a total of twenty-one names. Based on the membership evidence filed and the overlap between employees who signed union membership evidence and the statements of desire, the statements of desire were found to be "relevant". By decision of the Board dated April 28, 1988, the Board requested the Registrar to schedule this matter for hearing to hear the evidence and representations of the parties with respect to the voluntariness of the statements of desire, as well as those issues which remained in dispute between the parties.

3. The matter came on for hearing in the City of London on June 16 and June 17, 1988. At the commencement of the hearing, the applicant withdrew its challenge to the list regarding John Pethick. All parties agreed that Mr. Pethick was properly included in the bargaining unit. Thereafter, the Board commenced its inquiry with respect to the voluntariness of the statements of desire. The Board was unable within the two days scheduled for hearing to commence its inquiry into the duties and responsibilities of Mr. Ken Surette and the remaining outstanding issue as to his inclusion or exclusion from the bargaining unit, or as to whether maintenance employees were to be included or excluded from the bargaining unit description. At the conclusion of the second day of hearing, the Board advised the parties that it would appoint a Labour Relations Officer to inquire into the duties and responsibilities of Mr. Ken Surette and to report to the Board.

4. Counsel for the group of employees called three witnesses, Mr. John Pethick, the person primarily responsible for the origination and circulation of the petition, Ms. Dorothy Hunter and Ms. Agnes McKenzie. Counsel for the employer chose not to call any witnesses while counsel for the applicant called Ms. Dawn (Donna) West. Each witness was extensively cross-examined by counsel for the other parties. The evidence of each of these witnesses is briefly summarized below. In assessing the evidence of all the witnesses, we have taken into account the usual factors including the consistency of the witnesses' evidence, their demeanour while testifying, their response in cross-examination, their ability to resist the influence of self-interest to modify their recollection, and what appears to be reasonably probable when the circumstances and testimony are considered. We have also considered the parties' submissions concerning the evidence of the witnesses.

5. Grace Villa Chronic Care Hospital ("Grace Villa") is a sixty-bed chronic care facility located at 201 Riverside Drive in the City of London. Mr. John Pethick is a physiotherapy aide who has been employed at the hospital for the past two years. Mr. Pethick's duties are performed by him throughout the hospital. He does however have a desk area in an office located in the basement of the hospital. He shares this office with both his supervisor, Ms. Pat Cream, who is the occupational therapist for the hospital, as well as the assistant occupational therapist. This office area houses the patient files and records, and the equipment of the occupational therapy department. The office is located across from the staff lunchroom. This lunchroom is used only by the non-managerial staff of the hospital.

6. Mr. Pethick first became aware of the union's attempts to organize the employees at Grace Villa in the beginning of March 1988. At that time he was approached to join the union and indicated that he did not wish to do so. The green sheets indicating that the union had applied for certification were posted on March 9, 1988. Mr. Pethick testified that after the green sheets were posted there was some discussion amongst the staff about the union.

7. At some point during the day, Mr. Pethick decided to draft and circulate a petition in opposition to the union. That night, at around supper time, he telephoned Dorothy Hunter, a fellow employee. He placed the call from his home. Mr. Pethick called Ms. Hunter because he knew that several years ago Ms. Hunter had circulated a petition in opposition to a union at Grace Villa. Mr. Pethick asked for, and obtained advice from, Ms. Hunter about the drafting of the petition and its circulation. That same night Mr. Pethick telephoned a friend whom he felt was familiar with this type of matter. His friend came over and the two discussed the petition. His friend advised him to ensure that management was not involved with the petition. Mr. Pethick also testified that he read some books about labour relations including the Guide to the Labour Relations Act which persons can acquire from the Board. It was Mr. Pethick's evidence that he had obtained these books several years ago while he was employed at Kennick Barber and Beauty Supply. He stated that he obtained the material because he "wanted some general information". Mr. Pethick also commenced to telephone some fellow employees on March 9, 1988.

8. On March 10th Mr. Pethick took the petition which he had drafted the previous evening to work. Rather than recounting in detail the exact time and place when each signature on the petition was obtained, it is sufficient to note that over the course of the next several days Mr. Pethick obtained the signatures of several employees (P7, P22, P8, P9, P10, P11, P15, P4, P17, P18, P5 and P2) in the employee lunchroom. The signatures of P12, P1 and P20 were obtained in the Grace Villa parking lot at a time when those employees were not scheduled to work. The remaining signatures (P13, P14, P6, P3, P16 and P19) were obtained at these employees' residence. Mr. Pethick retained custody and control of the petition until it was mailed to the Board. He kept the petition either at his home, at his desk at work hidden underneath the bottom shelf which lifts up, or in his duffel bag underneath a compartment that raises up. Mr. Pethick did not discuss the procedure to be followed in respect of the application with any member of management. He has not made any arrangements or agreements with his employer with respect to his legal expenses, stating instead that some employees have contributed while he has paid the balance. Similarly, he attended the first day of hearing in Toronto and has not received any money from his employer to cover his expenses for attendance at that hearing. In order to attend he arranged to take one of his floating holidays.

9. Mr. Pethick testified that there was no pressure placed on the employees to sign the petition. The general thrust of his evidence was that employees were aware of his opposition to the union and his circulation of the petition. Indeed all the witnesses were in agreement that Grace Villa was a relatively small work environment where word of the petition got around quickly. Some of the employees knew of the petition by "word of mouth", and therefore approached Mr. Pethick directly. Others who signed were contacted by Mr. Pethick. Mr. Pethick testified that those who signed the petition did so because they wanted a "free" and "open vote" on the issue of union representation. Mr. Pethick testified that he did not approach his fellow employees while they were on duty.

10. In respect of the signatures that were obtained in the lunchroom, Mr. Pethick testified that those signatures were obtained while the employees were either having their break, or at the commencement or end of the employees' shift. With the exception of the signatures of P7, P9, P2 and perhaps P4 no other employee, other than Mr. Pethick and the signatory were present in the

lunchroom on those occasions. In the case of P4, Mr. Pethick indicated that other employees, but not management personnel, might have been present when P4 signed. The only other person present when P7, P9 and P2 signed was Ms. McKenzie. The evidence of Ms. McKenzie however indicated that employees normally take their breaks in shifts and at regular times. Their first break is usually from 9:25 to 9:45 a.m. At that time three employees, one from each area of the hospital, take their break. The second break is from 9:45 to 10:05 a.m. That break is attended by two employees from each area of the hospital for a total of six employees. Similarly, three employees are scheduled for the first lunch break, from 12:00 to 12:30 p.m. while the remaining six employees take their lunch break from 12:30 to 1:00 p.m. It would therefore appear to be somewhat unusual for *only* the signatory to the petition and Mr. Pethick to be in the lunchroom.

11. For his part, Mr. Pethick testified that his break and lunch periods were “flexible” and that he was the only employee who had the option to “split” his lunch break rather than taking the entire thirty-minute period “en bloc”. In cross-examination, Mr. Pethick testified that he normally works alongside his supervisor Ms. Cream, that Ms. Cream normally knows when he is taking his lunch, and that most of the time he and Ms. Cream take their lunch break together and eat their lunch in the lunchroom together. Apart from Ms. Cream, the only other supervisory person who frequents the employee lunchroom is the head of the housekeeping department. Mr. Pethick stated on several occasions however that no member of management, and specifically Ms. Cream, was ever present when the petition was signed in the lunchroom. On those occasions Mr. Pethick did not take his lunch or break with Ms. Cream.

12. Similarly, the signatures of some employees were obtained at the end of their shift (11:00 p.m. - 7:00 a.m.) when Mr. Pethick commenced his own shift (7:00 a.m. - 3:00 p.m.). In this regard Mr. Pethick stated that he is normally at work around 6:20 a.m. while his supervisor normally arrives at 6:50 - 6:55 a.m. Most employees arrive prior to the start of their shift. Before the start of a shift therefore there are normally four or five persons in the lunchroom. When P10 signed at the end of P10’s shift however, no other employee was present. When P4 signed at the end of P4’s shift, Mr. Pethick did agree that there “might have been someone else” in the room.

13. The substance of the preceding evidence was corroborated by Ms. Hunter who testified about the telephone conversation with Mr. Pethick, and by Ms. McKenzie, who testified about her limited involvement with the petition. Ms. McKenzie’s evidence also confirmed the fact that from the day the green sheets went up there was quite a bit of discussion among employees and that employees knew of the petition by word of mouth. From the totality of the evidence we conclude that the fact that a petition in opposition to the union was being circulated by John Pethick was well known at Grace Villa and was certainly not a secret.

14. There were however some areas of Mr. Pethick’s evidence which was either contradictory or which was contradicted by the other witnesses. In assessing this contradictory or contradicted evidence we have considered the impact of the contradictory or contradicted evidence not only when assessing the credibility of Mr. Pethick on particular matters, but more importantly the impact of such evidence on Mr. Pethick’s evidence as a whole. In addition, we must address the effect, if any, of six separately-written letters revoking membership in the union by persons who subsequently signed the petition.

15. Mr. Pethick testified that as employees signed the petition he covered up all the other names which had already been placed on the petition with a piece of paper or cardboard. In this way, employees were shown only the heading to the petition and their own signature. In cross-examination Ms. McKenzie however agreed with counsel that Mr. Pethick “just gave the paper” to employees and “they signed”. In argument, counsel for the union pointed to this contradiction

when making his arguments about Mr. Pethick's credibility. In our view, the mere fact of these two apparently contradictory statements are insufficient and are as easily attributable to the method and manner in which counsel phrased their questions as to a lack of candour on either witnesses' part.

16. The second inconsistency between the evidence of Ms. McKenzie and Mr. Pethick however is not as easily explained. Mr. Pethick specifically stated that he paid all postage cost himself "out of my own pocket". Ms. McKenzie testified that the cost of the postage was split stating that she thought it was eleven dollars and that she split the cost because John "took the bother". Such contradictory evidence is not easily attributable to mere vagueness of recollection, hazy memory or the manner in which counsel phrased the question.

17. A third inconsistency or conflict in the testimony of Ms. McKenzie and Mr. Pethick centres around the events of March 16th. Initially, Ms. McKenzie testified that Mr. Pethick showed her the petition after he had obtained all the signatures on the petition and prior to its posting. She thought that Mr. Pethick probably showed her the petition after they had clocked out and as they were going home. At that point they discussed sending the petition by registered mail etc. Given the facts that the last signatures on the petition were obtained on March 16th, that Ms. McKenzie specifically testified that the last signature was on the petition when she last saw it, and that the petition was mailed on the 16th of March, we were led to the inevitable conclusion that the conversation which Ms. McKenzie recollected must have taken place on March 16th as the employees were leaving at the end of their shift. In redirect, Ms. McKenzie however agreed that she could not say for sure that the conversation did occur on the 16th. For the obvious reasons set out below, such a conversation could not possibly have taken place on that day under those circumstances. On the whole, we find that we cannot accept Ms. McKenzie's evidence as reliable. The weight to be attributed to her evidence is minimal. The kindest view that can be placed on her recollection of events is that she has a vague and hazy memory, a less kind view is that she was deliberately trying to attempt to mislead the Board. In the circumstances of this case, it is not necessary for us to determine which of these two assessments is the appropriate one. It is sufficient to state that we have discounted Ms. McKenzie's evidence as unreliable.

18. Before we turn to a more in depth review of the events of March 15th and 16th, we wish to deal briefly with the evidence of Ms. West. Ms. West testified that on Monday, March 14th she witnessed and overheard an exchange between Mr. Pethick and Ms. Cream on the stairs leading from the basement lunchroom to the first floor. According to Ms. West, Ms. Cream was descending the stairs while Mr. Pethick was on his way up. When the two passed each other, Ms. Cream asked Mr. Pethick how things were going with the petition to which Mr. Pethick replied that "it looks okay, I think we're alright". As this exchange took place, Ms. West was several steps below the two. She continued on her way up the stairs and passed Mr. Pethick and Ms. Cream without comment or acknowledgement. Ms. West mentioned this comment to a fellow employee, June Millar, several days later, but made no further mention of it to anyone else. In fact, she did not mention it to anyone else until the first day of the hearing of evidence in this case. This notwithstanding the fact that she had been instructed by the union to "keep an eye out" or "ears open for anything unusual at the hospital". Ms. West acknowledged in cross-examination that at the time she overheard this conversation, Mr. Pethick would be aware of the fact that she did not support his efforts in respect of a petition in opposition to the union's application for certification. Indeed, she agreed that by that time Mr. Pethick would know where she stood in this matter. It is also important to note that when the substance of this alleged conversation was put to Mr. Pethick in cross-examination, he initially replied "I don't recall that". When pressed and asked if he denied such conversation having taken place he responded "I don't remember" and subsequently stated "I'm not admitting it either".

19. We note that Ms. West's evidence was received by the Board over the objection of counsel for the employer and counsel for the objectors. The position of counsel for the employer, with which counsel for the objectors concurred was that the substance of Ms. West's evidence was to allege "improper or irregular conduct" on the part of the employer and ought to have been pleaded with particularity by the union in accordance with Rule 72. Counsel pointed to the fact that this was in essence the third day of hearing although it was only the second day of hearing of the evidence. To permit the introduction of the evidence at that stage of the proceedings without granting to the respondent an adjournment so that full particulars could be provided in accordance with Rule 72(1) would result in prejudice to the respondent. For his part, counsel for the union indicated that the information had only been disclosed to him during the course of the first day of the hearing of evidence, that he had raised the matter as soon as he became aware of it and indeed had put the alleged conversation to Mr. Pethick during cross-examination without objection from either counsel. It was his position that at the very least the evidence of Ms. West would go towards the issue of the credibility of Mr. Pethick and ought to be admitted. He further argued that an adjournment ought not to be granted regardless of whether the evidence went to allegations of improper or irregular conduct or merely Mr. Pethick's credibility. At the hearing the Board orally ruled that the evidence would be received as it went towards credibility and that counsel for the respondent would certainly be given an opportunity to address the evidence of Ms. West by way of reply evidence. Although we admitted Ms. West's evidence we note that we have placed no weight on it and her evidence has had no effect on our ultimate determination of this matter. The alleged conversation, if it did take place in the manner and under the circumstances described by Ms. West (and we make no finding that such a conversation did in fact take place), would not have had an effect on our final decision in the circumstances of this case.

20. We now return to a more detailed review of the events of March 15th and 16th. The substance of Mr. Pethick's evidence-in-chief was that on March 15th he obtained the signatures of P4, P1, P16, P17, P18, P5 and P2 (whose signatures appear in that sequence on the petition). Although the date next to P16's signature is March 16, 1988, Mr. Pethick testified that the only signatures obtained on March 16th were the signatures of P19 and P20. In light of this evidence and the fact that the four signatures immediately following P's signature are all dated as March 15th, we conclude that P16 signed the petition on March 15th and not on March 16th as indicated. In addition, we note that Mr. Pethick testified that he received individually-written letters in a sealed envelope from P6, P3, P4, P1, P5 and P2 *prior* to obtaining their signatures on the petition. Mr. Pethick mailed these letters to the Board on March 15, 1988. The signatures on the petition which precede P2's signature must therefore have been obtained on or before March 15, 1988. There is no evidence that the signatures were obtained in any order other than the order in which they appear on the petition. As P16's signature precedes the signature of P2, that signature must have been obtained on or before March 15, 1988.

21. According to Mr. Pethick, P4 signed the petition on March 15th at approximately 6:55 a.m. in the employee lunchroom. P4 had telephoned Mr. Pethick the day before and had asked to sign the petition at the end of P4's shift. P4 works the 11:00 p.m. - 7 a.m. shift. Mr. Pethick next testified that he obtained the signature of P1 at approximately 3:10 p.m. on March 15th in the parking lot at Grace Villa. P1 works the 7 a.m. - 3:00 p.m. shift. P1 had also telephoned Mr. Pethick the night before and the two had arranged to sign the petition after work at Mr. Pethick's van in the parking lot. P1 did in fact sign in Mr. Pethick's van and although others were present further away in the parking lot, no one else was in the van when P1 signed. Mr. Pethick testified that P16 (whose signature appears next on the petition) signed the petition at approximately 7:00 p.m. at P16's residence. Thereafter however, he testified that the next four signatures on the petition (P17, P18, P5 and P2) were all obtained on March 15, 1988 in the employee lunchroom during those employees' lunch or break periods. It is difficult to understand how four signatures obtained during

the course of the workday could sequentially follow signatures obtained at the end of the shift (3:10) or in the early evening (7:00 p.m.).

22. This apparent contradiction in and of itself however would not have caused the Board undue concern. The failure of a witness to recall precisely the exact date, a particular time or a particular location when or where an employee signed the petition, or even the erroneous testimony in respect of such matters, in isolation will not necessarily impugn the credibility of a witness or call into question the voluntariness of the petition. What has caused the Board concern, and one of the reasons we find that the objecting employees have not discharged the onus cast upon them, arises from Mr. Pethick's failure to disclose a material fact in examination-in-chief, his admission to that fact (albeit with an explanation) during cross-examination and the relationship of that fact to the remainder of Mr. Pethick's evidence concerning the events of March 15th.

23. In examination-in-chief, Mr. Pethick did not mention that he left the workplace early on March 15th. Indeed, his evidence was to the contrary, namely that he obtained P1's signature on the petition at the end of the shift at approximately 3:10 in the parking lot. During extensive cross-examination, however, Mr. Pethick testified that on March 15th he left work early at approximately 2:20 p.m. His purpose for leaving work early was to attend at a medical supplies store to pick up either a sponge cushion or cervical collar which was required for a patient at Grace Villa. This medical supplies store was approximately ten to fifteen minutes' drive from Grace Villa. It is not unusual for Mr. Pethick to pick up medical supplies of this sort. On the 15th Mr. Pethick also mailed by registered mail the six letters which he had received from certain employees. Mr. Pethick testified that he mailed the letters after he had attended at the medical supplies store. In response to a question in cross-examination as to whether he returned to work that day, he specifically answered "no" and explained that it was understood that he would bring the medical supplies to work the following day. In answer to a subsequent question from the Board, Mr. Pethick indicated that he did not return to Grace Villa on that day. His testimony in cross-examination was thus materially-different from his evidence in chief regarding the time, place and circumstances under which P1 signed the petition.

24. Similarly, in examination-in-chief, Mr. Pethick failed to refer to the fact that on March 16th he also left work early. In cross-examination, however, his evidence disclosed that he left work at approximately 2:00 p.m. on that day for the purpose of making a bank deposit for the hospital. In this instance, he agreed that it was "unusual" for him to make such a deposit, although he did recall having made a similar deposit some time ago. Again, in response to a question in cross-examination, Mr. Pethick answered that he did not return to work that day. In his evidence-in-chief, however, Mr. Pethick testified that on March 16th he obtained P19's signature on the petition at approximately 4:00 p.m. at P19's residence, and the signature of P20 in the hospital parking lot at 4:30 p.m. Mr. Pethick had made arrangements to meet P20 in the parking lot at that time in a telephone conversation on March 15th. In response to the question in examination-in-chief as to how he got to P19 residence, Mr. Pethick testified that he had arranged it "shortly after 3:00 on March 16th". Under cross-examination, Mr. Pethick's recollection of obtaining P19's signature was what he termed "a bit foggy" and he could not recall whether P19 signed at P19's home or at work. Similarly, in cross-examination he was not "quite sure" about the time of P20's signing indicating that it could have been around 3:30. Mr. Pethick, mailed the petition to the Board on March 16th sometime before 5:00 p.m.

25. On the whole, Mr. Pethick's evidence during cross-examination was much less open and forthright. When questioned about his early departures on two successive days, the days on which he mailed first the letters and then the petition itself, Mr. Pethick's evidence was hesitant and on occasion evasive. In light of Mr. Pethick's contradictory evidence concerning the events of March

15th and 16th, and his demeanour while testifying about those dates, we are of the view that his evidence on other points is suspect. From the evidence as presented, we also conclude that Mr. Pethick did, or at the very least that employees would perceive that Mr. Pethick had, left work early, for purposes relating to the petition in opposition to the trade union's application for certification (in this regard see for example *Irwin Toy Limited* [1971] OLRB Rep. Feb. 52, *Saga Investments Ltd.* [1970] OLRB Rep. July 452, *G. Smith Produce Company* [1974] OLRB Rep. June 402, *N.J. Spivak* [1976] OLRB Rep. April 158). These two factors taken together with (a) the fact that the petition was signed on company premises, (b) on occasions when other employees would normally expect Mr. Pethick to be in the company of his supervisor Ms. Cream who was conveniently absent from the area on the four successive workdays when the petition was signed in the lunchroom, and (c) in light of our determination on the effect of the six letters as addressed below, we find that the objectors have not discharged the onus of proving that the statement of desire is a voluntary expression of the true wishes of the employees. Although it may be that none of these six factors standing alone would be sufficient to cast doubt upon the voluntariness of the petition, their cumulative effect have caused us to doubt the reliability of the document as a voluntary expression of the true wishes of the employees.

26. Section 73(1) and section 73(5) of the Board's Rules of Procedures state:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer; and
- (b) is filed not later than the terminal date for the application.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witnesses as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

In cases of this sort, the onus of establishing that the petition is a voluntary expression of the true wishes of the employees, and therefore to call evidence as to the origination of the petition and the circumstances in which each signature was obtained falls upon the objecting employees.

27. In this case, in addition to the petition about which Mr. Pethick testified, the Board also received six separate letters from six individual employees at Grace Villa. Each letter was contained in a separate, sealed envelope. The six sealed envelopes were placed in one large envelope and sent by Registered mail on March 15th and received by the Board on March 16th. The petition on the other hand was mailed on March 16th and received by the Board on the 17th. Mr. Pethick testified that the authors of the six letters had consulted him about how they could withdraw their signification in favour of union membership. Each individual requested information about how or what he/she could do to withdraw their union membership. Mr. Pethick suggested to each person that he/she write a letter to the Board setting out the reasons why they wanted to withdraw their

union membership evidence. Mr. Pethick was not the author of these letters, did not assist or aid the authors of the letters in drafting the letters and indeed did not know of the contents of the letters until that information was provided to his counsel by the Board. Mr. Pethick had requested each of these individuals to put their letter in a sealed envelope which he did not open. Each of the authors of the letters also signed the petition. The letters were given to Mr. Pethick “just before their signature on the petition ... on the same day they signed the petition”. The Board was not presented with any other or further evidence concerning these letters.

28. Counsel on behalf of the objectors argued that the six letters were not relevant to the Board’s determination (although the letters did formally comply with Rule 73(1)) and need not be considered by the Board. Counsel argued that the signatures of these six employees on the petition *after* they had written the letters meant that the Board needed only to look at the petition to see if the numerical threshold of fifty-five per cent had been met. In order to meet this numerical threshold, there was no need to consider the six additional letters. In addition, counsel argued that the contents of the letters were innocuous and reflected a classic “change of heart” by these employees. It was his submission that the letters were not reflective of employer interference or employer participation in the petition.

29. In our opinion, the language of Rule 73(5) is permissive and discretionary. Although the Board *may* dispose of an application without considering the statement of desire of any person who fails to appear in person or by a representative, we are not compelled to do so. We may consider the application and such a statement of desire notwithstanding the absence of the employee or the employee’s representative if we consider it fair and just to do so. In the circumstances of this case, in view of the fact that these letters were provided to Mr. Pethick by their authors contemporaneous with their signature on the petition we consider it relevant, appropriate and proper to consider these “signification(s) by employees that they no longer wish to be represented by a trade union”. Neither can we agree with counsel’s position that the contents of these letters are innocuous as at least one of the letters links the employee’s perception of his/her job security to his/her support or non-support of the union’s application. The evidence concerning these letters falls short of meeting the requirements of Rule 73(5) in that we do not have any “testimony in the personal knowledge and observation of the witness as to:

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

30. In the circumstances of this case and for all the reasons cited herein, we find that the evidence before us falls short of discharging the onus of proving that the statement of desire is a voluntary expression of the true wishes of the employees.

31. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 18, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. This is so regardless of whether Mr. Surette is to be included or excluded from the bargaining unit and regardless of whether maintenance employees are included or excluded from the bargaining unit description. Mr. Surette is the *only* employee described as a maintenance employee. The applicant’s right to certification cannot be affected by the Board’s ultimate decision on the issue of Mr. Surette’s inclusion or exclusion from the bargaining unit.

32. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, and pending final resolution of the description and composition of the bargaining unit, hereby certifies the applicant as bargaining agent for all employees of the respondent in London, save and except registered nurses, graduate nurses, undergraduate nurses, paramedical employees, *maintenance employees*, supervisors, persons above the rank of supervisor, office, clerical and sales staff.

Clarity Note I

For the purpose of clarity, the term 'paramedical' includes, occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dieticians, registered and non-registered pathological technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered and non-registered EEG, ECG and ophthalmology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear, nose and throat technicians, cardiovascular technicians, electroencephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, electronic technicians, psychometrists, pharmacists, pharmacy technicians, psychologists, remedial gymnasts, medical records librarians, social workers, child care workers, nutritionists, dental health educators and bio-medical technicians.

The Board notes the agreement of the parties that "paramedical personnel" also includes psychometry technicians, chiropodists, prenatal instructors, audiologists, research assistants, dental assistants, perfectionists, clinical instructors, medical photographer technical assistants, entrostomol therapists, respiratory therapists, hyperbaric controllers, hyperbaric attendants, health records administrators, occupational therapy assistants.

Clarity Note II

It is agreed and understood that the term 'office, clerical and sales staff' would include giftshop.

33. Upon reflection and reconsideration it appears that the ultimate disposition of this application and the issuance of a formal certificate may be unnecessarily delayed if the board appoints a Labour Relations Officer and has to await the officer's report prior to resolving the issues surrounding Mr. Surette's ultimate inclusion in or exclusion from the bargaining unit. The sheer logistics associated with the appointment of a Labour Relations Officer (including the making of the arrangements for the conduct of an inquiry into duties and responsibilities, the typing of the officer's report, the delay in awaiting the parties submissions concerning that report), generally cause the appointment of a Labour Relations Officer to be an inherently slow, expensive and time-consuming process. For this reason, in the circumstances of this case this Board is drawn towards the process and procedure set down by the board in *Green Gables Manor Incorporated*, [1986] OLRB Rep. May 626. In that case the Board stated:

6. Obviously there is a dispute between the parties which may ultimately have to be resolved after hearing evidence about what the disputed individuals actually do; moreover, this is not the first time that there has been some question as to where to draw the "managerial line" in hospitals or nursing homes....

7. The Board's approach to "managerial exclusion" has been succinctly summarized in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121. In that case the Board

affirmed that the important question is the extent to which so-called managerial employees regularly make significant decisions affecting the economic lives of their fellow employees (hiring, firing, promotions, demotions, discipline, granting wage increases, etc.), thereby raising a potential conflict of interest with them. But this is not the same as “supervisory” or “co-ordinating” activities which are often largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or have specialized technical professional training will commonly supervise or co-ordinate the work of other employees without triggering their exclusion from the *Labour Relations Act*. If that were the case, registered nurses would be denied the opportunity of collective bargaining since their professional responsibilities will often involve the coordination of the work of employees with lesser training. [In this regard, see: *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84, where the Board rejected an employer’s contention that its entire complement of full-time and part-time registered nurses exercised managerial functions within the meaning of section 1(3)(b) of the Act; and *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199, where a similar request to exclude registered nurses was also rejected. See also, in general, J. Sack and M. Mitchell, *Ontario Labour Relations Board Law and Practice* (1985), Butterworths & Co. (Canada) Ltd., Toronto at pages 79-98.]

8. Certification applications usually come on for hearing and are disposed of quickly with little in the way of formal pleadings. However, as a result, disputes about the bargaining unit may only arise on the morning of the hearing when the union first sees the employer’s proposed list of employees, and the parties may not have had the opportunity to fully investigate the facts or the Board decisions potentially bearing on their positions. They may even have quite different perceptions of the disputed individuals’ authority (or how the Board would regard it) which could be clarified by further consideration. If that appears to be the case (as it is here), it may well be appropriate for the Board to borrow from the Court practice of pleading and discovery in order that both sides and the Board itself will have a clear picture of the factual issues in dispute.

9. In the circumstances of this case, before appointing a Labour Relations Officer and embarking upon a time-consuming and expensive process of litigation, the Board considers it appropriate to require further clarification and elaboration of those duties and job functions which, in the employer’s submission, would warrant a finding that the disputed individuals are not “employees” within the meaning of the *Labour Relations Act*. Such written statement should include a detailed recital of the duties regularly performed by the disputed individuals, highlighting those which involve the conflict of interest which section 1(3)(b) was designed to avoid, and citing concrete instances of the exercise of those functions. It should be forwarded to the Board and to the union within fourteen days of the receipt of this decision. The trade union representative will then have a further fourteen days to file with the Board a written submission, indicating the extent of its agreement or disagreement with the facts said by the employer to truly represent the employees’ duties and such additional facts as the union may consider relevant.

10. For the foregoing reasons and pursuant to section 102(13) of the Act, the Board directs the parties to file with each other and the board the information mentioned above. It may be that in examining their position the parties will be able to resolve or narrow some of the issues in dispute between them. In any event, it is the Board’s view that the filing of this material will facilitate the orderly disposition of whatever outstanding matters remain in dispute.

34. In the circumstances of this case therefore, before appointing a Labour Relations Officer, the Board considers it appropriate to require further clarification and elaboration of those duties and responsibilities which, in the employer’s submission, would warrant a finding that the disputed individual is not an “employee” within the meaning of the *Labour Relations Act*. Such written statement should include a detailed recital of the duties regularly performed by the disputed individuals, highlighting those which involve the conflict of interest which section 1(3)(b) was designed to avoid, and citing concrete instances of the exercise of those functions. It should be forwarded to the Board and to the union within fourteen days of the receipt of this decision. The trade union representative will then have a further fourteen days to file with the Board a written submission, indicating the extent of its agreement or disagreement with the facts said by the employer to truly represent the employees’ duties and such additional facts as the union may con-

sider relevant. Similarly, the Board considers it appropriate to require further clarification and elaboration from the employer on the facts and reasons why maintenance employees should be excluded from the bargaining unit description as well as the facts upon which the respondent relies in support of its position that maintenance employees and/or Ken Surette do not have a community of interest with that portion of the bargaining unit upon which the parties have agreed.

35. For the foregoing reasons and pursuant to section 102(13) of the Act, the Board directs the parties to file with each other and the Board the information mentioned above. It may be that in examining their position the parties will be able to resolve or narrow some of the issues in dispute between them. In any event, it is the Board's view that the filing of this material will facilitate the orderly disposition of whatever outstanding matters remain in dispute.

DECISION OF BOARD MEMBER J. W. MURRAY; September 12, 1988

1. I cannot agree with the decision of the majority of the Board to certify the applicant.
 2. There was no evidence introduced to show that management was involved in any way; indeed counsel for the applicant agreed with this, but claims that this could be inferred. Many things could be inferred but management involvement is not one of them.
 3. There was no evidence of any threats or coercion by anyone.
 4. This is a relatively small hospital and it is quite probable many people knew of Mr. Pethick's petition efforts, but mere knowledge surely cannot affect the statements of desire as to their voluntariness.
 5. Much seems to have been made of Pethick's leaving work a bit early on two days. He got permission to do so. It is alleged that he had a conversation with Ms. Cream on a stairwell. I find it hard to believe this was a conversation, but rather a couple of remarks made in passing one another. I find nothing sinister in that. It is true that many of the signatures were obtained in the lunchroom, but they appear to have been during lunch or coffee breaks and with no management people around. I cannot find that any alleged time discrepancies are more than difficulty in placing the exact hour of certain events.
 6. In lack of specific evidence to show the statements of desire were in any way tainted, I would order a vote.
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0935-88-R Labourers' International Union of North America, Local 183, Applicant v. **Javid Construction Management Limited**, Respondent v. Group of Employees, Objectors

Certification - Petition - Practice and Procedure - Request by employee objectors to extend terminal date and post notices in Italian and Portuguese - Employees who are not proficient in English or French able to exercise their rights under the Act - Request denied - Certificates issuing

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Craig Flood* and *Tony Pinto* for the applicant; *I. Kleiner* and *Murray Hartsman* for the respondent; *Benny Del Duca* and *Sam Saleh* for the objectors.

DECISION OF THE BOARD; September 19, 1988

1. The name of the respondent appearing in the style of cause of this application is amended to read: "Javid Construction Management Limited".

2. At the commencement of the hearing the parties agreed upon the correct name of the employer in this application for certification. Based upon the assurances of the other parties that the employer of the persons affected by this application was Javid Construction Management Limited, the applicant requested leave of the Board to withdraw its request for relief under sections 63 and 1(4) of the *Labour Relations Act* with respect to Greyrock Developments Limited carrying on business as Chestnut Hill Homes and Greyrock Building Corporation. In the circumstances of this application, the request of the applicant for relief under sections 63 and 1(4) of the Act with respect to Greyrock Developments Limited carrying on business as Chestnut Hill Homes and Greyrock Building Corporation is withdrawn by leave of the Board.

3. The respondent informed the Board that it had received constructive notice as opposed to actual notice of the hearing in this matter. The respondent further informed the Board that it was ready, willing and able to proceed with the hearing. The extended terminal date fixed for this application was August 16, 1988. The respondent also informed the Board that the Form 78, Notice to Employees of Application for Certification, Construction Industry (the "Notice") was posted on the three job sites of the respondent where the employees affected by this application worked on August 15, 1988, between 7:30 a.m. and 9:00 a.m. It was the position of the respondent that the employees affected by this application had received the Notice of an application for certification which named "Greyrock Developments Limited carrying on business as Chestnut Hill Homes and Greyrock Building Corporation" as the respondents and not "Javid Construction Management Limited" as the proper respondent. The respondent argued that the Board ought to amend the name of the respondent, extend the terminal date and post a new Notice for the benefit of the employees. The objectors informed the Board that they had received notice of this application in the English language. However, the objectors adopted the position that the Notice of this application ought to have been printed in the Italian and Portuguese languages in addition to the English language. The objectors stated that some of the employees affected by this application did not read the English language and that a new posting of the Notice in the Italian and Portuguese languages was necessary so that the employees affected by this application would have notice thereof. The objectors requested an adjournment of the hearing so that the terminal date could be extended and notice given in the Italian and Portuguese languages. The respondent subsequently adopted the position of the objectors with respect to the Italian and Portuguese languages. The applicant argued that there had been sufficient notice to the employees affected by this application

and that it was not necessary to extend the terminal date either to name the respondent in the Notice as the employer or to translate the Notices into the Italian and Portuguese languages. The applicant argued that the Board ought to proceed with the hearing and challenged the status of the respondent to raise the matter of the adequacy of the Notice to the employees affected by this application. After hearing the arguments of the parties, the Board ruled at the hearing that, for reasons to be given in writing, it would proceed with the hearing. The reasons for this ruling are now set forth in paragraphs four, five and six.

4. It was the unchallenged position of the objectors that they knew who was their employer because the name "Javid Construction Management Limited" was printed on their pay cheques. In addition, the Board had revealed to all of the parties that the heading on the document expressing opposition to this application for certification (the "document") read as follows:

Chestnut Hill Homes & Greyrock Building Corp.

We, the undersigned employees of Javid /Construction Management Limited, do not wish to be represented in our employment relations by Labourers International Union of North America, Local 183.

5. The respondent has no standing in the circumstances of this application to act as a spokesman for the objectors. See *Federated Building Maintenance Company Limited*, [1979] OLRB Rep. Oct. 974; *Quebec Labour Relations Board v. Cimon Ltee*, [1971] S.C.R. 981; 21 D.L.R. (3d) 506; *Cunningham Drug Stores Ltd. v. B. C. Labour Relations Board*, [1973] S.C.R. 256; 31 D.L.R. (3d) 459; and *Re Canada Labour Relations Board and Transair Ltd.*, (1976) 67 D.L.R. (3d) 421. The Board notes that, in any event, the authorities relied upon by the respondent were distinguishable on a factual basis from the facts in the instant application. Thus, in *Adena Investments Limited*, [1971] OLRB Rep. Jan. 1, the Board directed the Registrar to extend the terminal date where notice of an application for certification had not been posted; in *Saga Investments*, [1970] OLRB Rep. June 312, a certificate was revoked where the respondent and its employees had not received notice of the application until after the certificate had been issued; in *Cochrane Nursing Homes Limited*, [1974] OLRB Rep. April 204, the terminal date was extended and a proper posting was effected where employees at one location had not received notice of an application for certification; and in *Starways Distributors, A Division of Harlequin Enterprises Limited*, [1986] OLRB Rep. April 561, the Board held that employees affected by an application were entitled to notice of an intervenor's application for certification. In the instant application, the Board is satisfied that the employees of the respondent received notice of this application and were aware that the respondent was their employer. The Board notes that the objectors did not raise any objection with regard to the period of notice on the sufficiency of the Notice in the English language with respect to the respondent as the employer of the employees who are affected by this application.

6. With regard to the request to extend the terminal date of this application and post the notices in the Italian and Portuguese languages, it has not been the practice of the Board to post such notices in these languages. It has not been the experience of the Board that employees who are proficient in neither English nor French have been unable to exercise their rights under the Act. In *Federated Building Maintenance Company Limited*, *supra*, the Board stated at page 976 as follows:

13. Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or

with public administrative tribunals. Immigrant Canadians generally obtain, and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal. In this case, all 125 of the employees were able to respond to the Board's subpoena, written in English, issued to them by the employer. In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under *The Labour Relations Act*. (*IlSCO of Canada Ltd.*, [1973] OLRB Rep. May 221; *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 688; *Dylex Ltd.*, [1977] OLRB Rep. June 357.)

Having regard to the representations before it, the Board is not prepared to extend the terminal date of this application and post the notices in the Italian and Portuguese languages.

7. The Board heard evidence with respect to the origination, preparation and circulation of the document. Benny Del Duca and Sam Saleh gave evidence before the Board in this regard. In our opinion Mr. Del Duca was not a credible witness. The extent of help he received from a friend in the preparation of the document was unclear. At one time Mr. Del Duca appeared to indicate that his friend had prepared the document and subsequently he appeared to indicate that he had prepared a rough draft. Mr. Del Duca also contradicted himself when he testified about the amount of time off from work he requested in order to circulate the document - two half days or one and a half days. There was also a variation in the excuses he gave for the time off, the method of conveying these excuses and whether all the excuses originated from him or whether some originated from his mother. In addition, Mr. Del Duca offered no believable explanation as to how and why he filed the document at the time and place he did file the document. Mr. Saleh admitted lying to counsel prior to the hearing and in our view he was an unreliable witness. Having regard to the evidence before it, the Board is not prepared to give any weight to the evidence respecting the origination, preparation and circulation of the document. The Board is not prepared to find that the signatures on the document represent the voluntary wishes of the employees who allegedly signed it. In these circumstances, the Board is not prepared to find that there is any doubt cast upon the evidence of membership filed by the applicant.

8. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

9. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for

such geographic area have already been acquired under subsection 3 or by voluntary recognition.

10. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 16, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 8 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

13. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2052-87-U Local 2228 of the International Brotherhood of Electrical Workers, Complainant v. **Nortec Air Conditioning Industries Ltd.**, Respondent v. Van Hoa Quach on his own behalf and on behalf of a group of employees of Nortec Airconditioning Industries Ltd., Intervener

Adjournment - Duty to Bargain in Good Faith - Practice and Procedure - Remedy - Unfair Labour Practice - Request for supplementary reasons denied - Decisions speak for themselves - Adjournment denied - Parties ordered to execute collective agreement as remedy for breach of bargaining duty

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *R. R. Montague* and *W. H. Wightman*.

APPEARANCES: *Phillip Hunt* for the complainant; *Paul Kane* and *Aaron Rubinoff* for the respondent; *Walter T. Langley* and *Van Hoa Quach* for a group of employees.

DECISION OF THE BOARD; September 7, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which the Board found on December 24, 1987 that the respondent had violated section 15 of the Act. At that time, the Board found it appropriate to give the parties an opportunity to come to an agreement with respect to remedy, although it remained seized should the parties be unable to reach agreement. Subsequently, the complainant advised the Board that the parties had been unable to reach agreement on a remedy and asked that the matter be set down for hearing.

2. At the outset of that hearing, the Board advised the parties that a Labour Relations Officer was available to assist them in their settlement attempts. The parties indicated their willingness to meet with the Officer, and the Board recessed the hearing briefly to enable them to do so. When the hearing resumed, the parties advised the Board that they had been unable to settle their differences with the assistance of the Officer. However, counsel for the respondent also requested that the Board adjourn the hearing because he had been under the impression that the day had been set aside for settlement discussions and that the hearing would not proceed. Counsel also advised the Board that his client was in Montreal and that while he had spoken to him that morning, his client did not wish to give him instructions over the telephone. In addition, he requested supplementary reasons for the Board's decision of December 24, 1987. Both the complainant and a group of employees purporting to intervene were prepared to proceed.

3. The Board heard the parties' submissions and then ruled orally as follows:

Having considered the submissions of the parties, we are not prepared to issue supplementary reasons in this matter. We are also not persuaded that in the context of the Board's jurisprudence, there are sufficient grounds for an adjournment. As a result, we will be proceeding today with the hearing of this matter. We are, however, prepared to recess for one hour to allow counsel for the company to consult with his client.

We now provide our reasons.

4. For some time the Board and the courts have recognized that "labour relations delayed are labour relations defeated and denied" (see *Journal Publishing Company of Ottawa Limited et al v. Ottawa Newspaper Guild Local 285, OLRB et al*, unreported, March 31, 1977 (Supreme

Court of Ontario)). The Board's policy was described in *Nick Masney Hotels Limited*, [1968] OLRB Rep. Nov. 833 as follows:

The Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the parties' case is unable to attend because of serious illness.

See also *Baycrest Centre of Geriatric Care*, [1976] OLRB Rep. Aug. 432; *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. Nov. 1036; *Northwest Merchants Limited Canada*, [1983] OLRB Rep. July 1138 and the cases cited therein.

5. The notice of hearing in this matter which was sent to the respondent included the following paragraphs:

1. TAKE NOTICE of the hearing by the Board for THE PURPOSE OF considering the evidence and representations of the parties with respect to all matters arising out of and incidental to the complaint filed under Section 89 of the *Labour Relations Act*.

2. AND FURTHER TAKE NOTICE that the hearing will take place at the "B.C. Room", Westin Hotel, 11 Colonel By Drive, Ottawa, Ontario on Thursday the 7th day of July, 1988, at 9:30 o'clock in the forenoon E.D.T. and continuing on Tuesday the 30th day of August, 1988, Wednesday the 31st day of August, 1988, and Thursday the 1st day of September, 1988, at 9:30 o'clock in the forenoon E.D.T.

3. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

This notice was dated May 19, 1988. On June 15th, counsel for the respondent wrote to the Board confirming that he had received the notice of hearing and reciting the days which had been scheduled for hearing, including July 7th. In that letter counsel requested that the hearing dates other than July 7th be rescheduled. Nowhere is it suggested that counsel was under the impression that July 7th was anything other than a normal hearing day, or that July 7th should be rescheduled.

6. In response to the respondent's letter, the complainant wrote to the Board on June 21st noting that there had been no request to change the July 7th hearing date and referring to the hearing commencing on that date. A copy of this letter was sent to counsel for the respondent. It was not clear how counsel for the respondent arrived at the impression that the July 7th hearing date was for settlement discussions only. However, given the notice of hearing and this exchange of correspondence, in our view it was incumbent upon him to clarify his understanding with the Board or the complainant.

7. In addition, it cannot be said that the reasons for the adjournment were completely beyond the control of the party making the request and that proceeding would seriously prejudice the party in the terms contemplated by the Board in *Nick Masney*, *supra*. Taking the respondent's case at its highest and assuming there was some genuine misunderstanding, we note that counsel was able to contact his client at the time to obtain instructions. Indeed, the Board specifically provided counsel with the opportunity to do so in its oral ruling. That opportunity was declined by counsel on the basis that his client had already indicated to him that he did not wish to give instructions over the telephone. We note that the complainant in this case was certified to represent employees in January of 1987. The parties reached a memorandum of settlement with respect to wages and working conditions on July 28, 1987. Almost a year later, no collective agreement has been signed as a result of the respondent's violation of section 15 of the Act. The prejudice to the

rights of employees and the complainant as a result of the excessive delay incurred already is significant, and the Board was not prepared to add to that delay. To allow an adjournment in such circumstances would seriously undermine the expedition that is essential to the Board's procedures.

8. The Board also declined to issue supplementary reasons. On February 9, 1988, the Board issued a sixteen page decision detailing its reasons for its decision of December 23, 1987. Those decisions comprehensively address the issues before the Board at that time, aside from the matter of remedy. Counsel's proposal amounted to a request for further elaboration as to why one of his arguments at the original hearing had not been successful. The Board found it unnecessary and inappropriate to enter into a discussion with counsel in this regard either by way of supplementary reasons or otherwise. In our view, the decisions spoke for themselves.

9. The Board then turned to the complainant's objection to the standing of a group of employees to intervene in these proceedings. This group rested its claim to standing on the basis that it had filed a termination application several months after the Board's decision of December 24, 1987. However, at the hearing the complainant withdrew its objection and together with the respondent, agreed to allow the group of employees to participate. In light of that agreement, the Board exercised its discretion to permit the group of employees to be involved in the hearing without making any finding with respect to their legal status to do so. (For a discussion of the Board's discretion in this regard, see *Ontario Hydro*, [1986] OLRB Rep. May 663; *Great Lakes Forest Products Ltd.*, [1987] OLRB Rep. Sept. 1136).

10. The parties then made their submissions with respect to the appropriate remedy in this matter. On July 11, 1988 the Board issued the following decision:

1. After carefully considering the parties' submissions with respect to the appropriate remedy in this matter, we direct that the respondent and the complainant execute a collective agreement in the form of Appendix "1" forthwith. We further direct that the said collective agreement shall have the same force and effect as if the parties had executed it on September 8, 1987. Our reasons in this matter will follow.

We now provide our reasons.

11. The Board's approach to remedies is summarized in *Radio Shack*, [1979] OLRB Rep. Dec. 1220:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a greater temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. The temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case.

12. In this case the gravamen of the violation found by the Board was that the respondent refused to execute a collective agreement based on the parties' agreement because the latter had not been ratified by employees. One of the elements to consider in fashioning an appropriate remedy is how the parties can best be restored to the positions they would have been in had the violation not occurred. The most effective way to do that in this case is to require the respondent to

execute the same collective agreement it refused to execute in violation of the Act. While this is the remedy which would naturally flow from the facts of this case, the Board has in certain circumstances declined to direct the execution of a collective agreement (see, for example, *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309). However, where all the terms of such an agreement have been resolved, the Board has directed the execution of a collective agreement (see *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138; *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954; *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337).

13. In this case, the Board previously found as a fact that all the terms of an agreement had been resolved by the parties on July 28, 1987. The parties then agreed to amend that agreement by changing the tester rate on August 12, 1987. (See *Nortec Air Conditioning Industries Limited*, Board File No. 2052-87-U, February 9, 1988.) The Board also noted in that decision that there was some dispute between the parties as to whether the last line of Appendix B had been agreed to on July 28th or not. At that time, the Board commented that it was not a question of the parties having left this clause unresolved, but rather of a dispute arising subsequently as to the precise language which had been agreed upon. At the remedy hearing in this matter the complainant advised the Board that it was prepared to concede that the parties had agreed on July 28, 1987 to include the last line of Appendix B with respect to the rotation of arbitrators. As a result, not only had the parties resolved all the terms to be included in their collective agreement, but there was also no longer any subsequent dispute with respect to the content of any of those terms. We therefore concluded that the appropriate remedy in this case was to direct the respondent to execute a collective agreement based on the parties' own agreement.

14. The complainant asserted and the respondent did not dispute that Mr. Charron had contacted Mr. Houlahan to arrange a meeting during the week of September 8, 1987 in order to execute a collective agreement. These facts are also recited in a letter from Mr. Kane to Mr. Charron dated September 9th, set out at paragraph 10 of the Board's decision of February 9, 1988. We therefore directed that the collective agreement be treated as having the same force and effect as if it had been executed on September 8, 1987. This was essential to the provision of an effective remedy in this case, and provided the best approximation of the position the parties would have been in had the violation not occurred. We note, however, that the parties' agreement includes a provision with respect to the term of the collective agreement. Thus, the effect of our decision is that the parties will have a collective agreement with a term running from the 1st day of June, 1987 until the 31st day of May, 1990 which will have the same force and effect as if it had been executed on September 8, 1987.

15. The parties advised the Board previously that the respondent had filed a request under section 40 for a final offer vote. As set out in our decision of February 9, 1988, the respondent applied for a final offer vote on December 17th, after it had had notice of these proceedings. The vote was held after the Board's decision of December 24, 1987 in which the Board found that the respondent had engaged in bad faith bargaining. Subsequent to our decision of February 9th, the respondent filed a section 89 complaint alleging bad faith bargaining on the part of the complainant in this matter because the complainant had refused to sign a collective agreement based on the offer that was put to employees under section 40. That complaint has now been withdrawn, and we do not propose to make any comment upon it. However, for the purposes of this decision, we would note that we have considered this sequence of events in arriving at our decision in regard to remedy, and it does not change our view with respect to the appropriate remedy.

0532-88-R; 0533-88-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant v. **Ontario Bus Industries Inc.**, Respondent v. Group of Employees, Objectors; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Complainant v. Ontario Bus Industries Inc., Respondent

Certification Where Act Contravened - Evidence - Membership Evidence - Practice and Procedure - Board declining to dismiss application at preliminary stage on basis that union has membership support of only 20% - Order of proceeding determined where mixed onus - Mailed membership evidence meeting Board requirements - Form 9 declarant not subject to cross-examination in circumstances - Employer requesting that Board order advance production by union of any tape recording which it has in its possession of any statements made to employees by company officials - Board reviewing its policy on advance production of documents - Union ordered to produce any tapes in its possession on which it intends to rely

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

APPEARANCES: *D. Harris*, *Clare Meneghini* and *Hassan Yussuff* for the applicant/complainant; *R. C. Filion* and *D. K. Sheardown* for the respondent; *Dale Sharp*, *Jeff King* and *Dave Heppollette* for the objectors.

DECISION OF THE BOARD; September 15, 1988

1. File No. 0532-88-R is an application for certification in which the applicant (also referred to in this decision as the "Union") seeks to be certified under section 8 of the *Labour Relations Act*. File No. 0533-88-U is a complaint under section 89 of the Act in which the Union alleges that it has been dealt with by the respondent (also referred to in this decision as the "Company") contrary to the provisions of sections 3, 64, 66, and 70 of the Act. The Union also relies upon those allegations in support of its application for certification under section 8.

2. At the commencement of the hearing on August 9, 1988, counsel advised the Board that they had agreed to argue a number of preliminary issues and to request the Board to issue a decision regarding those issues before proceeding further. Thus, this decision is confined to those preliminary issues.

I

3. On June 24, 1988, representatives of the parties met with a Board Officer and reached agreement on all aspects of the bargaining unit description, with the exception of the issue of whether persons regularly employed for not more than twenty-four hours per week ("part-time employees") should be excluded from the unit, as contended by the respondent and the objectors, or included in the unit, as contended by the Union. (The language on which the parties are agreed is: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.") If the parties are unable to resolve that issue, it will be dealt with during the course of these proceedings. However, the resolution of that issue will not affect the count, as the respondent had no part-time employees at the time the application was made.

4. It is common ground among the parties that there were 331 employees in the bargaining unit at the time the application was made. The Union has filed membership evidence in respect of

67 (20.2%) of those employees. Counsel for the respondent requests that the Union's application for certification under section 8 be dismissed without a hearing on the merits, on the basis that the Union does not have "membership support adequate for the purposes of collective bargaining" within the meaning of section 8 of the Act. Counsel for the Union opposes that request, and contends that the determination of that matter should not be made until after the Board has heard the application on its merits. The objectors made no submissions on that matter or on any of the other issues covered by this decision.

5. Having duly considered the submissions of counsel, we are not prepared to dismiss the Union's section 8 application without a hearing on the merits. The issue of whether a trade union has "membership support adequate for the purposes of collective bargaining" is not simply a question of numbers or percentages. It is a matter on which the Board forms an opinion in each case on the basis of all of the circumstances of that case, including the stage at which the impugned employer conduct occurred, the severity of that conduct, and the circumstances surrounding the signing of cards prior to the impugned employer conduct: see, for example, *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, and *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562. Thus, we will not be in a position to make an informed decision on that issue until after we have heard the Union's section 8 application on its merits. We would also observe that it may ultimately be unnecessary to decide that issue at all, if the evidence does not support the Union's contention that the respondent, by contravening the Act, has created a situation in which the true wishes of the employees are not likely to be ascertained. It may also be noted that the allegations on which the Union relies in support of its section 8 application are identical to the allegations on which it relies in support of its section 89 complaint. Thus, it will be necessary to hear evidence and argument regarding those allegations regardless of whether the section 8 application proceeds or is dismissed.

II

6. In view of their congruity, these two files should clearly be heard together to save expense and avoid a multiplicity of proceedings. (Consolidation is not appropriate as there is not an identity of parties: see *Dresser Canada, Inc.*, [1987] OLRB Rep. Oct. 1243, at paragraph 8.) Having considered the parties' submissions concerning the order of proceeding, we have decided that the Union should proceed first on all aspects of the case, followed by the respondent and the objectors. The Union will then be afforded an opportunity to adduce reply evidence. Argument will proceed in the same order. In reaching this decision we have taken into account a number of factors. Although the section 89(5) "reverse onus" applies to some of the Union's allegations, such as the discharge of Momcilo Trajkovic and the suspension of Stanislaw Pietras, it is questionable whether it applies to a number of the Union's other allegations (including those concerning "captive audience" meetings and the questioning of individual employees by members of management) which appear to form an important part of the Union's case (see, generally, *Canadian Pizza Co. Ltd.*, [1983] OLRB Rep. June 872, and *Domtar Packaging*, [1982] OLRB Rep. July 993). Moreover, the Union has the burden of establishing the elements of section 8, including the aforementioned matter of whether it has membership support adequate for the purposes of collective bargaining in the circumstances of this case. In a case such as the present one in which the Union has filed relatively few membership cards, evidence concerning the Union's organizing campaign before and after the impugned employer conduct may well also be of central importance. Under the circumstances, it appears to us that calling upon the Union to proceed first with its evidence on all aspects of the case will be the fairest and most expeditious manner of proceeding.

III

7. Hassan Yussuff, a National Representative of the Union, signed the Form 9 Declaration Concerning Membership Documents (the "Declaration") which was filed by the Union in accordance with the requirements of section 6 of the Board's Rules of Procedure. In an accompanying letter which is referred to in paragraph 3 of the Declaration, Mr. Yussuff wrote to the Board's Registrar as follows:

With reference to the enclosed Form 9 (paragraph 3), please be advised that seven (7) Application for Membership Cards, as per the attached list, were received by mail at the CAW office in North York.

Each of the applicants listed were contacted to confirm their application, signature and membership fee.

Trusting you will find the enclosed in order.

8. Company counsel submits that he should be permitted to cross-examine Mr. Yussuff because seven of the membership cards were mailed to the Union, and because Momcilo Trajkovic may have been the collector on some or all of the seven mailed cards. Mr. Trajkovic is one of the grievors named in the Union's section 89 complaint. The Union alleges that Mr. Trajkovic's employment was terminated by the Company on or about May 2, 1988, in contravention of the Act. The Company denies any violation of the Act, and contends that Mr. Trajkovic was terminated for fabricating the facts of an incident in which he was allegedly injured in the plant as a result of two objects having been thrown at him. Counsel for the Union opposes Company counsel's request to cross-examine Mr. Yussuff.

9. Although the use of mailed membership evidence can make it difficult for a union to refute "non-sign" or "non-pay" allegations (see, for example, *Wallace Barnes Co. Ltd.*, [1965] OLRB Rep. July 282), the Board has for many years accepted mailed membership evidence where the union's reliance on such membership evidence is duly noted in the Form 9, or in material which accompanies the Form 9 or the mailed membership evidence filed with the Board: see, for example, *Fotomat Canada Limited*, [1979] OLRB Rep. Apr. 306; *E.B. Eddy Forest Products Ltd.*, [1977] OLRB Rep. Oct. 694; and *Canadian Gypsum Company Limited*, [1961] OLRB Rep. Nov. 280. In the instant case, Hassan Yussuff, the Form 9 declarant, advised the Board (in the above quoted letter which accompanied the Declaration) that seven membership cards had been received by mail at the Union office. Mr. Yussuff also advised the Board in that letter that each of the seven persons in respect of whom the Union had received mailed membership evidence had been contacted to confirm their application, signature, and membership fee. By means of a list attached to that letter, the Union provided the Board with the names and addresses of those seven persons. The seven envelopes in which the mailed cards were received by the Union were also filed with the Board, along with the Union's membership cards and Declaration. Mr. Yussuff is the collector whose signature appears on each of the seven cards. In view of the information which the Union has provided to the Board in the manner described above, we are satisfied that, subject to the Board's usual "second check", the seven membership cards in question meet the Board's requirements with respect to mailed membership evidence.

10. We are also satisfied that there is nothing in the circumstances of this case which warrants permitting counsel for the respondent to cross-examine the Form 9 declarant. No allegations have been filed with the Board alleging that any of the individuals in respect of whom the Union has filed membership evidence did not sign a membership card or pay an initiation fee of one dollar, as indicated by the membership evidence and confirmed by the Declaration. Employee signatures on the membership cards have been compared with employee signatures filed with the Board

by the respondent, and have been found to be identical. (That comparison will be repeated, as part of the Board's usual "second check", before a final decision issues in respect of the Union's certification application.) Moreover, no allegations have been made which, if proven, would cause the Board to find any of the statements made by Mr. Yussuff in the Declaration (or in the material which accompanied it) to be false. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board refused to permit an employer to cross-examine the Form 9 (then Form 8) declarant in circumstances which are not materially different from those of the instant case. In doing so, the Board noted (in paragraph 30) that the Board "accepts the Form 8 [now Form 9] attestation on its face unless allegations are made which, if proven, would cause the Board to find that the statements attested to therein are false". In dismissing an application for judicial review of that decision, the Divisional Court held that the refusal to permit such cross-examination was not a denial of natural justice (*Re Tandy Electronics Ltd. and United Steelworkers of America et al.* (1979), 26 O.R. (2d) 68). See also *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223.

IV

11. The final matter which remains to be decided at this time is the Company's request that the Board order the Union to produce any tape recordings (and transcripts thereof, if they exist) which it has of statements made to employees by Company officials during the period covered by the complaint. In making that request, Company counsel noted that the detailed particulars filed by the Union contain numerous quotations of statements allegedly made by Company representatives, which quotations lead the Company to believe that some or all of the statements may have been tape recorded. It was his position that the order should be made in order to prevent "trial by ambush" and "procedural trickery" designed to "blind side" an opponent. He also noted that advance production of such tapes could significantly reduce the time required to complete the hearing of these matters because the respondent, after reviewing the tapes and transcripts, would probably be in a position to have their contents placed before the Board as an agreed statement regarding what was in fact said. Respondent's counsel further asserted that the production of the tapes should be ordered irrespective of whether the Union intends to introduce them into evidence. However, he also stated that if counsel for the Union indicated that there were no such tapes, that would end the matter.

12. In responding to the Company's request, counsel for the Union declined to indicate whether or not the Union has any such tape recordings or transcripts in its possession, and asserted that it was "none of [the Company's] business". He noted that section 72(1) of the Board's Rules of Procedure requires a party to provide a concise statement of the material facts, actions and omissions upon which the party intends to rely, "but not the evidence by which the material facts, actions or omissions are to be proved". It was his position that neither the Act nor the Rules contemplate pre-hearing production. Moreover, he contended that the Board should not adopt such a procedure as it could result in the Board becoming "bogged down in pre-hearing production". He further submitted that if the Company wished to have any such tapes and transcripts which may be in the Union's possession introduced into evidence, it should utilize the Board's summons *duces tecum* process.

13. In recent years the Board has taken a number of steps to foster advance production of documents, with a view to promoting settlement discussions and expediting the hearing process by narrowing the issues in dispute and minimizing the need for document related adjournments. Practice Note No. 18 (dated May 27, 1986) requires that an application requesting the Board to direct that a first collective agreement be settled by arbitration include a copy of all documents in the applicant's possession on which it intends to rely, and further requires the applicant to deliver a duly completed copy of the application (including those documents) to the respondent prior to

filing the application with the Board. Similarly, that Practice Note requires that the respondent's reply (which must be filed within ten days from the day the application was delivered to the respondent) include a copy of all documents in the respondent's possession on which it intends to rely, and further requires that the respondent deliver a duly completed copy of the reply (including those documents) to the applicant prior to filing the reply with the Board. Practice Note No. 19 (dated June 6, 1986) requires each party to arbitration proceedings before the Board in respect of the settlement of a first collective agreement to file with the Board and with each other party, no later than nine days from the date on which the notice initiating the proceedings was filed with the Board, all documentation (as well as the information and submissions) on which it relies in support of each bargaining matter that remains in dispute. Practice Note No. 15 (dated August 2, 1988), in conjunction with section 60 of the Board's Rules of Procedure, requires a complainant to file, together with its jurisdictional dispute complaint, a copy of all documents relating to the work in dispute which may be in its possession and upon which it proposes to rely in support of its claim for relief. That Practice Note also stipulates that prior to filing its complaint with the Board, a complainant must serve copies of the complaint and documents on each respondent and each person named in the complaint as someone who may be affected by the complaint.

14. The Board has also from time to time directed pre-hearing production of documents in particular cases. See, for example, *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, at 1732:

....In a number of recent cases involving claims for substantial damages the Board has entertained pre-hearing motions requesting production of documents and greater particularity. In granting these requests, in whole or in part, the Board has relied upon section 103(2)(a) which provides:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, *and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction* in the same manner as a court of record in civil cases;

Reliance has also been placed on rule 47(3) of the Board's Rules of Practice which provides:

47.-(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

And, in some of these cases, a labour relations officer has been appointed by the Board to facilitate the exchange of material between the parties and to assist in settlement efforts. Clearly, if such cases are to be litigated fairly and, particularly, if there is to be any chance of settlement, full and frank disclosure by the parties of both the detailed particulars of a damage claim and the documentary evidence that will be relied upon must occur prior to a hearing before the Board.

There are also some recent decisions, made during the course of ongoing hearings, in which the Board has directed that documents be filed with the Registrar, to be made available for inspection by a party's authorized representative in advance of hearing continuation dates, in order to expedite the hearing process and avoid unnecessary adjournments: see, for example, *Forintek Canada Corp.*, [1985] OLRB Rep. July 1050, and *Shaw-Almex Industries Limited*, [1984] OLRB Rep.

Apr. 659. Advance production of documents has also been fostered by means of pre-hearing conferences convened by the Board.

15. It has been the Board's experience that, in appropriate cases, advance production of documents has promoted settlement discussions and expedited the hearing process by minimizing the need for document related adjournments and by enabling parties to narrow the issues in dispute. However, we are also cognizant of the possibility that hearing and deciding issues concerning the proper scope of advance production may delay the disposition of a case. It is clear that the instant case will take a substantial amount of time to adjudicate. Indeed, counsel for the Union has suggested that as many as twenty days of hearing may be required. Although we are not prepared at this juncture to direct production of tape recordings (and transcripts) on which the Union does not intend to rely, we are of the view that it is appropriate in the circumstances of this case to require the Union to produce any tape recordings and transcripts thereof in its possession on which it does intend to rely in these proceedings. This approach will expedite the hearing of this matter without giving rise to problems concerning the adequacy or completeness of production (as it is self-enforcing, in that the Union will be precluded from relying upon any tape recordings and transcripts in its possession which it has not produced). We are satisfied that the Board has the power to direct such production as master of its own practice and procedure under section 102(13) of the Act, which provides, in part, as follows:

The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions....

Moreover, as indicated above, section 103(2)(a) gives the Board the express power to compel production of "such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction".

16. For the foregoing reasons, the Board hereby orders and directs the Union to produce to respondent's counsel, on or before September 30, 1988, any tape recordings and existing transcripts thereof in its possession on which it intends to rely in these proceedings.

17. The hearing of these matters will continue before this panel of the Board on the dates which have been scheduled by the Board.

1085-88-M Ottawa Newspaper Guild, Applicant v. The Ottawa Citizen, Respondent

Employee Reference - Practice and Procedure - Board outlining how it deals with employee references in light of the *Windsor Star* decision abolishing the "changes" doctrine - Respondent claiming that individual was an independent contractor - "Employee" versus "independent contractor" dispute falling within s.106(2) inquiry - Officer appointed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

DECISION OF THE BOARD; September 28, 1988

1. This is an application under section 106(2) of the *Labour Relations Act* in which the

applicant is seeking a determination as to whether Paul Rainville is an “employee” within the meaning of the Act.

2. In *The Windsor Star*, [1988] OLRB Rep. Apr. 427 at paragraph 14, the Board outlined the information which thenceforth would be required in section 106(2) applications:

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to “changes” in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties’ agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a “question” has arisen as to the “employee” or “guard” status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual’s status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person’s status, the Board will not permit evidence as to the person’s duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board’s opinion, this policy does not undermine agreements of the parties as to the person’s status and avoids repeated or frivolous examinations, yet provides sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

3. When an application under section 106(2) is received, the Registrar acknowledges the application, directs the applicant’s attention to the relevant passages in *The Windsor Star* decision, *supra*, and establishes a deadline for submission of the required information. The applicant’s materials are circulated to the respondent for reply by a specified date and the respondent, as well, is directed to the relevant excerpt from *The Windsor Star*, *supra*. Finally, the respondent’s reply, if any, is circulated to the applicant for comments, again, with a deadline established. The Board considers the material filed and, in the context of the principles set out in *The Windsor Star*, *supra* (paragraphs 8 to 15 in particular), either appoints a Board Officer to conduct a duties and responsibilities examination of the person(s) in dispute, or declines to do so.

4. In the instant case, the applicant contends that Rainville is an “employee” within the meaning of the Act. The facts asserted by the applicant as the basis for the application are such that, if proved true, could well ground a finding that Rainville is an employee. The respondent argues that a Board Officer should not be appointed because the dispute is whether the individual is or is not covered by the collective agreement and, further, takes the position that Rainville is an “independent contractor”. That is, the respondent contends the appointment should also be refused on the basis that the issue is not whether Rainville is “managerial” within the meaning of section 1(3)(b) of the Act.

5. If the issue which the applicant seeks to have resolved is not the “employee” status of an individual but whether that individual is properly included in or excluded from the bargaining unit, the Board would decline to appoint a Board Officer to conduct a duties and responsibilities inquiry as that question is to be resolved at arbitration: see *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. July 1134. In the instant case, it is accurate

to note that the applicant does assert that Rainville falls within the scope of the collective agreement. However, the dispute is not restricted to that issue. That is, if the applicant and respondent *agreed* that Rainville is an “employee” under the Act, the Board would decline to direct an examination as the remaining question of exclusion in or exclusion from the bargaining unit should be determined at arbitration. However, the respondent contends that Rainville is an “independent contractor”. Most section 106(2) applications involve disagreements as to whether an individual is an “employee” or “managerial” within the meaning of section 1(3)(b). The statutory language in section 106(2), however, addresses the question of the “employee” (or “guard”) status of an individual. In the Board’s view, this encompasses not just “employee” or “managerial” disputes but “employee” or “independent contractor” disagreements as well. While the decision in *The Windsor Star*, *supra*, spoke of mischief in the context of the “employee” versus “managerial” issue, the reasoning applies as well to “employee” versus “independent contractor” disagreements. Independent contractors are not “employees” under the Act and, if included with employees in bargaining units would engender conflicts of interest just as inimical to the parties’ collective bargaining relationship as those founding the exclusion of “managerial” persons within the meaning of section 1(3)(b). Thus, the Board rejects the respondent’s argument that an examination should be refused because the issue does not involve the “managerial” status of Rainville.

6. Having regard to the material filed by the parties and the jurisprudence, the Board is satisfied that this is an appropriate issue for resolution under section 106(2) and that a “question” has arisen between the parties as to Rainville’s “employee” status. Accordingly, a Board Officer is hereby appointed to inquire into the duties and responsibilities of Paul Rainville.

7. This matter is referred to the Registrar in accordance with the above.

0124-88-R Labourers’ International Union of North America, Ontario Provincial District Council, Applicant v. **Purigan Masonry Ltd.**, Respondent

Certification - Construction Industry - Practice and Procedure - Officer appointed to inquire into whether persons at work on application date and nature of work performed - Respondent refusing to make its employees available to the officer and to supply the last known addresses of persons it says are no longer employed by it - Board directing respondent to comply - Board will accept applicant’s claim as correct if respondent refuses to cooperate

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

DECISION OF THE BOARD; September 8, 1988

1. The name of the respondent is amended to read: “Purigan Masonry Ltd.”.

2. This is an application made under the construction industry provisions of the *Labour Relations Act*. On April 15, 1988 a Board officer was authorized to inquire into and report to the Board on the list of employees filed by the respondent and the composition of the bargaining unit. The Board has received the officer’s report and a copy of it has been sent to the parties. No submissions were received from the parties within the time limit set by the Board.

3. The officer’s report reveals that the officer met with the parties and, in the course of the

meeting, the parties agreed that the following persons were construction labourers employed by the respondent who were at work in the bargaining unit described in the application on the date of making of the application:

John Green
George Henry
Paul Henhawk
John R. Ross
Clause Donavan

The parties are in dispute as to whether any of the following twelve persons were construction labourers in the employ of the respondent in the bargaining unit on the date of making of the application:

Bruce L. Alambets	Mike Pupi
Ken A. Danyluk	Dale Batchelor
Wayne Lavigne	Jim Vacheresse
Robert L. Arn	John Hearn
Berry Green	Terry Robins
Ted Quigley	Sean T. Mulroy

The respondent contends that all twelve persons are construction labourers who were at work in the bargaining unit on the date of making of the application. The applicant takes the contrary position. More particularly, the applicant takes the position that all twelve were not at work on April 15, 1988, the date of making of this application, or alternatively, they were not employed as construction labourers on that date. In addition, the applicant claims that Mike Pupi exercises managerial functions within the meaning of subsection 1(3)(b) of the Act and should be excluded from the bargaining unit.

4. The dispute respecting the twelve persons requires the Labour Relations Officer to inquire into whether they were at work on the application date and, if they were, to inquire into the nature of work which they were performing. As well, it would be necessary for the officer to inquire into Mr. Pupi's duties and responsibilities. The inquiry process requires the Board officer to receive the evidence of the challenged persons in a hearing before the officer. The parties would have the opportunity to cross-examine those persons and to call their own witnesses on the relevant issues. When the examination of all witnesses has been completed, the officer makes a report to the Board in the form of a verbatim transcript of the evidence. A copy of the report is provided to the parties who are given an opportunity to make submissions to the Board as to the conclusions which it should make on the evidence respecting the matters at issue.

5. The usual procedure of a Board officer is to conduct his/her inquiry on the respondent's premises or at a location convenient thereto. The Board requires the respondent to make available to the officer the persons whom the officer is to examine who are still employed by the respondent at the time of the officer's hearing. If any persons whom the officer is to examine have left the respondent's employ, the Board requires the respondent to supply the last known addresses of those persons and the Board arranges for them to attend at the inquiry. In the instant case, the respondent has refused to make its employees available to the officer and to supply the last known addresses of persons whom the respondent says are no longer employed by it.

6. The Board's procedure of taking evidence before an officer designated by the Board and providing a report to the Board and the parties in the form of a verbatim transcript of the evidence, and allowing all parties the opportunity to make submissions on the evidence to the Board, seeks to strike a balance between the need for expedition in responding to the needs of parties to

the collective bargaining process and the need for the Board to hear all of the relevant evidence. See, the Board's decision in *Kaneff Properties Limited*, [1980] OLRB Rep. Nov. 1653. That purpose is being frustrated by the respondent's refusal to comply with the Board officer's request to make available for the inquiry those of the twelve persons who are still in the employ of the respondent and the addresses of any of the twelve persons who have left its employ. Therefore, the Board will proceed as follows. The respondent is directed to advise the Board in writing on or before September 15, 1988 whether it is prepared to make available at a hearing of the Board officer those persons amongst the twelve who are at issue and who were in the employ of the respondent on September 8, 1988, and supply to the Board the last known address of each person amongst the twelve who were no longer in the respondent's employ on that date. If the respondent fails to comply with the Board's direction, the Board will accept as fact the applicant's claim that none of the twelve persons were construction labourers in the employ of the respondent at work in the bargaining unit on the date of making of this application.

2058-85-M; 0343-87-G Labourers International Union of North America, Local 607, Applicant v. **Rino Zanette (1981) Ltd.**, Respondent; Labourers International Union of North America, Local 607, Applicant v. Rino Zanette (1981) Ltd., Sault Holdings Limited, Zanette Investments Inc. and 444348 Ontario Limited, Respondents (63, 1(4)); Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, Applicant v. Rino Zanette Limited, Rino Zanette (1981) Ltd., 444348 Ontario Limited, Zanette Investments Inc., Sault Holdings Limited, Respondents

Adjournment - Construction Industry - Construction Industry Grievance - Natural Justice - Practice and Procedure - Related Employer - Sale of a Business - Witness - Board not permitting respondent in sale of a business application to be added as a respondent in a construction industry grievance where liability had already been determined - Adjournment request based on unavailability of counsel dismissed - Adjournment request based on hospitalization of key witness granted - Board fixing further hearing dates on peremptory basis - Adjournment of those dates on consent of all parties denied - Board dismissing allegations of bias and breach of rules of natural justice - Contempt of witness purged by his answering questions put to him - Sale of a business and related employer applications dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S.B.D. Wahl*, *P. Little* and *R. Davis* for the applicant; *Rino Zanette*, *P. Coccioglio* and *P. Jasiura* for Rino Zanette (1981) Ltd. and Sault Holdings Limited; *Lorne Firman* for 444348 Ontario Limited and Zanette Investments Inc.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER I. M. STAMP;
September 21, 1988

1. The Board has three applications before it. Board File No. 2058-85-M is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act* ("the first referral"). During the course of hearing the first referral, the applicant made an application under section 63

and subsection 1(4) of the Act. Related to its application under section 63 and subsection 1(4) of the Act, the applicant referred another grievance to arbitration under section 124 of the Act - Board File No. 0343-87-G ("the second referral").

2. In the course of the proceedings, the Board was required to make a number of oral rulings and was also called upon to deal with allegations of bias and that it breached the rules of natural justice. In order to appreciate the Board's rulings and its response to these allegations, the Board finds it appropriate to set out the history of the proceedings at some length.

3. In a decision dated January 27, 1986 concerning the first referral, the Board (differently constituted) found that Rino Zanette (1981) Ltd. contravened the collective agreement binding upon that company and the applicant and, accordingly, found that the grievance in that matter must succeed. The Board remained seized of the matter of damages in the event the parties were unable to resolve that issue. Subsequently, the Board was advised that the parties were unable to agree on the damages owing to the Labourers' International Union of North America, Local 607 ("Local 607"). The present panel was scheduled to hear the damages issue on October 27, 1986. Mr. Rino Zanette appeared at that time on behalf of Rino Zanette (1981) Ltd. What occurred on that day is set out in the Board's decision of November 19, 1986. In essence, the hearing was not completed on October 27, 1986 because Rino Zanette, who was called as witness by Local 607, refused to answer questions put to him and which the Board directed him to answer. One of the projects referred to in Local 607's grievance was the "CNR Hostel, Atikokan, near 109 White Street". Rino Zanette testified that Rino Zanette (1981) Ltd. did not perform any work on that project but he would not answer questions concerning who did perform the work even though he knew the answer since he testified he played a role in supervising the job. By refusing to answer questions as directed by the Board, Rino Zanette breached Board orders. The Board entertained submissions from the parties as to whether it would find Rino Zanette in contempt in the face of the tribunal. While Rino Zanette was making his brief submissions, the Vice-Chair asked him if he would like the opportunity to consult with counsel prior to the Board deciding the contempt issue. Rino Zanette responded by indicating that he would like to consult with counsel. After recessing to consider the matter and over Local 607's objection, the Board determined that it would adjourn the proceedings in order to give Rino Zanette the opportunity to consult with counsel. The Board directed that the matter would continue in Thunder Bay on December 15, 1986.

4. When the hearing resumed in Thunder Bay on December 15, 1986, Rino Zanette appeared with counsel, Mr. Coccimiglio of the law firm of Weiler, Maloney, Nelson. On behalf of his client, Mr. Coccimiglio advised the Board that Rino Zanette was prepared to answer all relevant questions and the Board proceeded to hear the remainder of Rino Zanette's evidence. Rino Zanette was again asked certain questions relating to the C.N.R. Hostel project and in his answers he disclosed the names of other companies in which he or other members of his family had an ownership interest. These companies were 444348 Ontario Limited ("444348"), Zanette Investments Inc. ("Zanette Investments") and Sault Holdings Limited ("Sault Holdings"). When it appeared that counsel for Local 607 was engaging in a subsection 1(4) inquiry, the Vice-Chair asked counsel the relevance of that line of questioning. Counsel advised the Board that it was the intention of Local 607 to make an application under subsection 1(4) and section 63 of the Act and to ask the Board to amend the first referral by adding the other companies as respondents. The Board determined that counsel's questions which were appropriate for a subsection 1(4) inquiry were not relevant to the issue then before the Board. When Rino Zanette's evidence was completed, counsel for Local 607 advised the Board that Local 607 was making a subsection 1(4) and section 63 application against the companies Rino Zanette referred to in his evidence. The Board suggested that counsel follow up his request with a letter setting out the information required to process such an application. Mr. Coccimiglio undertook to provide counsel for Local 607 with the correct names

and addresses of all the companies. Counsel for Local 607 then asked the Board to consolidate the subsection 1(4) and section 63 application with the first referral and to deal with the contempt issue by finding Rino Zanette guilty of contempt. After considering the parties submissions and recessing to consider the matter, the Board orally ruled at the hearing that it would not be appropriate to consolidate the matters at that time without hearing from the respondents in the subsection 1(4) and section 63 matter and prior to giving the employees of the companies notice of the application. The Board also orally ruled at the hearing that it would deal with the contempt issue at some later time in the proceeding. After consulting the parties regarding future dates, the Board fixed continuation dates in March at the hearing. The March dates were subsequently cancelled due to the unavailability of a Board member. After consulting with the parties to the first referral, the next dates fixed for the hearing were May 19, 20, and 21, 1987.

5. By letter dated January 6, 1987, Local 607 made its written request for relief under section 63 and subsection 1(4) of the Act. The appropriate Notice to Employees was sent to the respondents for posting. At the hearing on May 19, 1987, L. Firman appeared as counsel for 444348 and Zanette Investments. Mr. Rino Zanette appeared on behalf of Rino Zanette (1981) Ltd. and Sault Holdings. Although a statement of desire was filed with the Board, no one appeared at the hearing on behalf of objecting employees. Prior to the hearing, Mr. Firman filed the following letter dated May 11, 1987 with the Board:

May 11, 1987

We are the solicitors for 444348 Ontario Limited and Zanette Investments Limited and have recently been retained by our client with respect to proceedings scheduled by the Board to continue in Thunder Bay on May 19, 20, and 21, 1987. We take strong objection to our client being added to the proceedings at this late point in time and set out herein the basis of our objections:

1. It would appear that these proceedings commenced with the filing of a grievance by the Labourers International Union of North America, Local 607 against Reno Zanette Limited and Reno Zanette (1981) Ltd. and which grievance was filed on October 30, 1985. It should be noted that at this point in time, my clients, 444348 Ontario Limited and Zanette Investments Limited, were *not* named as Respondents.

2. The aforementioned grievance dealt with an alleged violation of the Collective Agreement at various construction projects listed in Schedule "A" to the grievance and specifically:

- (i) Commercial Building next to Marostica Motors, 10th Avenue, Thunder Bay;
- (ii) Arnone Transport Limited garage, Thunder Bay;
- (iii) CNR Hostel, Atikokan;
- (iv) Commercial Building, 1313 brown Street, Thunder Bay;
- (v) Motel Valencia, 103 Main Street, Atikokan.

3. The matter was then referred as a grievance to arbitration under Section 124 of the construction industry provisions of the *Labour Relations Act* and only Reno Zanette (1981) Ltd. was named as the Respondent. My clients, 444348 Ontario Limited and Zanette Investments Limited, were *not* named as respondents at that time. In addition, the Board gave the matter a file number 2058-85-M.

4. Subsequently, in November of 1985, Mr. W. Jackson, an Officer of the Board, was appointed to confer with the parties to endeavour to effect a settlement of the grievance in this case. The letter from the Board appointing Mr. Jackson was dated November 18, 1985, and was addressed to the Labourers International Union of North America, Local 607 and Mr. Ronald Davis as

Business representative. In addition, the Board by way of letter of November 18, 1985, served a formal Notice of Hearing on the Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicating that the Hearing of this matter would occur on November 29, 1985, in Toronto.

My clients, 444348 Ontario Limited and Zanette Investments Limited, have not been named as respondents to this point in time and therefore did not have the opportunity to avail themselves of the services of Mr. W. Jackson in an effort to resolve the grievance.

5. The Hearing originally scheduled for November 29, 1985, was subsequently rescheduled to occur on December 18, 1985, and once again, only Reno Zanette (1981) Ltd. was named as the Respondent.

6. The Board heard this matter and issued a decision on December 27, 1985, to the parties, Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicating that it was not prepared to grant the adjournment to the Hearing that was requested by counsel for the Respondent at that time. It should also be noted that apparently the Respondent had filed documents asking for judicial review of a different proceeding of the Board and which decision was rendered on January 27, 1984.

7. By way of decision dated January 27, 1986, the Board in a matter involving the Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicated that the Respondent company was bound by the Provincial Collective Agreement and was required thereby to utilize members of the Applicant Union for construction labourers' work for all sectors with respect to the six projects delineated, specifically:

- (i) CNR Hostel, Atikokan near 109 White Street;
- (ii) Commercial Building across the street from Marostica Motors, 10th Avenue, Thunder Bay;
- (iii) Arnone Transport Limited garage, 235 Queen Street, Thunder Bay;
- (iv) Halfway Motors Limited, Memorial Avenue, Thunder Bay;
- (v) Commercial Building, 1313 Brown Street, Thunder Bay;
- (vi) Building near the Valencia restaurant, 105 Main Street, West, Atikokan.

Again, only Reno Zanette (1981) Ltd. was named as the Respondent at that time and with respect to that decision and accordingly, 444348 Ontario Limited and Zanette Investments Limited, did not have an opportunity to participate in those proceedings, never having been made a party as Respondent to them.

By that same decision, the Board deferred dealing with the amount of damages in the hope that the parties could agree upon an amount and if they were unable to do so, the Board was to remain seized of the matter of damages.

8. On March 12, 1986, Mr. Steven Wahl wrote to the Ontario Labour Relations Board with respect to this file number, 2058-85-M indicating that the parties had not been successful with respect to the issue of quantum of damages and therefore requested that the matter be relisted for Hearing on a date to be fixed by the Registrar *in consultation with the parties*.

My clients, 444348 Ontario Limited and Zanette Investments Limited, were not consulted by Mr. Wahl or the Board with respect to the dates to be set by the Registrar because of course they were *not* parties to the proceedings. To therefore set dates at this point in time without consultation with my clients and establishing a date which is suitable to all is inequitable and a breach of natural justice.

9. On June 27, 1986, Mr. Paul Gordon, Carter & Johnson, solicitors in Thunder Bay, wrote to Mr. Steven Wahl of Koskie & Minsky confirming that an agreement had been made to adjourn

the proceedings at that time since Mr. Reno Zanette had been confined to a medical facility in Centre City, Minnesota, and was therefore unable to participate in the Hearing scheduled by the Board for June 30, 1986. A number of conditions were also set out in that letter of confirmation which listed several undertakings of Mr. Gordon on behalf of Reno Zanette (1981) Ltd.

444348 Ontario Limited and Zanette Investments Limited were *not* named as Respondents at this point in time and therefore were not included in any adjournment proceedings or in any consent to adjournment of the proceedings.

10. Mr. Steven Wahl subsequently wrote to the Board on July 31, 1986, indicating that he wished the matter of quantum of damages to be set down by the Board for hearing on September 8, 9, 15, 16, 17 or 29, 1986.

444348 Ontario Limited and Zanette Investments Limited were *not* consulted with respect to the suggested dates and were *not* listed as parties to the proceedings at this time. The Board subsequently issued a decision on November 19, 1986, dealing with the refusal of Mr. Reno Zanette to answer several questions put to him at the Hearing scheduled and heard on October 27, 1986. Since the matter was not concluded at that time the Board decided that the issue would continue on December 15, 1986, in Thunder Bay and the Board would hear further submissions from the parties on the issue of whether or not the Board should find Mr. Reno Zanette in contempt of the Board and if so, what penalty it would impose on Mr. Reno Zanette.

11. On January 6, 1987, Mr. Steven Wahl wrote to the Registrar indicating that the testimony at the Hearing on December 15, 1986, revealed that other corporations were associated or related businesses or activities under common direction and control with Reno Zanette Limited and/or Reno Zanette (1981) Ltd. with respect to their construction activities and specifically, those corporations were:

444348 Ontario Limited;
Zanette Investments Limited; and
Sault Holdings Limited.

At that time, Mr. Wahl requested the board to amend the operative grievance to assert a violation against each of the above-mentioned corporations jointly and severally and that the Board apply Section 63 and/or 1(4) of the *Labour Relations Act* and grant the appropriate relief. He also requested that notice be served on each of the above corporations.

This was the *first time* that 444348 Ontario Limited or Zanette Investments Limited had ever been named as parties to this proceeding. This of course was done at a time *after* the liability with respect to the grievance had been determined and the only matter to be decided was the quantum of damages. It is trite to say that it is too late in the day for the Union to attempt to expand the grievance at this point in time when in fact the parties, 444348 Ontario Limited and Zanette Investments Limited, were never notified or named as Respondents prior to this time, and therefore did not have an opportunity to defend against the grievance. To allow these parties to be added at this point in time would be a breach of natural justice since of course the parties do not know the evidence that has been introduced against them or Reno Zanette (1981) Ltd. to date.

In that same letter, Mr. Wahl indicated that the Board was to resume the Hearings on March 25, 26 and 27, 1987, but my clients, 444348 Ontario Limited and Zanette Investments Limited, still did *not* receive a copy of Mr. Wahl's letter of January 6, 1987, at this time and they were never informed of the resumption of Hearings on March 25, 26 and 27, 1987.

12. By way of letter of February 4, 1987, Mr. Wahl indicated that the grievance had been expanded to include 444348 Ontario Limited and Zanette Investments Limited and Sault Holdings Limited and the construction projects involved were also expanded to include 725 S. James Street, Thunder Bay, Ontario and an apartment building construction project at 800 Gordon Avenue, Thunder Bay, Ontario. The top portion of this letter indicates that the letter was "Delivered" to all of the companies named but 444348 Ontario Limited and Zanette Investments Limited never did receive such letter and it was not delivered to them.

Mr. Wahl also indicated in that same letter that the Hearing was to be scheduled on March 25, 26 and 27, 1987, and once again, my clients had *no input* into the time of the Hearings with respect to his matter.

13. On April 30, 1987, my clients, 444348 Ontario Limited and Zanette Investments Limited, were served with registered documents which indicated that the Hearing on this matter was scheduled to resume in Thunder Bay on May 19, 20 and 21, 1987, and in addition, also included a copy of the original letter of February 4, 1987, from Mr. Wahl and which date had been crossed out as well as the word "Delivered" crossed out and in its place, was the date April 29, 1987, and the word "Registered".

However, once again, my clients were *not* involved in the setting of the dates for this matter and such dates appear to have been suggested unilaterally by the Union.

.....

14. To date, my clients still have *not formally received* a copy of the grievance which started these proceedings. In addition, my clients have *not participated* in any proceedings with respect to the grievance to date, never having been set down as a party to the proceedings until *after* the question of liability had been determined and *after* the question of quantum of damages was found to be not capable of resolution by other parties. To therefore allow the *grievance to be expanded* so as to include my clients as parties at this point in time is an obvious breach of natural justice as well as being contrary to any of the principles of grievance administration.

15. Furthermore, the dates of May 19, 20 and 21, 1987, are not convenient to me or to my clients and since such dates represent a continuation of the previous Hearing, it is suggested that the Board practice usually is to confer with the parties with respect to the establishment of dates which are mutually convenient. Such dates have not been established on a mutually-convenient basis on this occasion and therefore we hereby request an adjournment of the said proceedings for these reasons.

16. We also request and respectfully submit that the matter of a violation of the Collective Agreement as specifically set out in this grievance filed cannot now be relitigated and cannot involve my clients since they were never named as Respondents in the first instance. To allow my clients to be added as parties at this stage in the proceedings would be analogous to having a Supreme Court action decided on the basis of liability and then allowing multiple parties to be added *after* the question of liability has been decided. Simply put, this is so obvious a breach of natural justice as to not warrant any further comment.

17. To date, my client only has been informed that the Hearing is to continue on May 19, 20 and 21, 1987, in Thunder Bay and that the matter involves the issue of damages arising by way of the grievance alleging a violation of the Collective agreement and also involves a Section 63 and Section 1(4) application by the Union. It is respectfully submitted that we require additional time and documentation in order to prepare for this matter and to fully deal with the case on behalf of our client. To establish the dates of May 19, 20 and 21, 1987, in a unilateral fashion without consideration of the time constraints of our client or ourselves is also inequitable and contrary to the normal Board practice.

18. Furthermore, my clients have been denied the opportunity to attempt to discuss the matter with the Union since my schedule does not allow such to occur prior to the hearing.

19. My clients have also not been given any particulars with respect to the Section 63 application for successor rights or the Section 1(4) related employer application and since the Board procedure is to have the Respondent proceed first, my clients are *unfairly disadvantaged* and *prejudiced* in not knowing the particulars which they are to address in any hearing, if they are to do so at all.

20. In summation, this proceeding by the Union is so *prejudicial, inequitable* and a *breach of material justice* to my clients as to require that the case be dismissed against my clients altogether with respect to any damages arising from the grievance and alternatively, at least be adjourned with respect to the issue of successor rights and related employer applications.

21. We therefore respectfully request that the proceedings scheduled for May 19, 20 and 21, 1987, against Zanette Investments Limited and 444348 Ontario Limited be adjourned with respect to the issue of successor rights under section 63 and related employer under Section 1(4) and in addition, that the matter of damages against Zanette Investments Limited and 444348 Ontario Limited be dismissed altogether.

We would appreciate an answer with respect to this matter as soon as possible.

Yours truly,
G. Lorne Firman

6. When the hearing commenced on May 19, 1987, the Board entertained oral submissions from the parties concerning the issues raised by Mr. Firman's letter of May 11, 1987. After recessing to consider the submissions, the Board orally advised the parties of its rulings with respect to the issues that were addressed. The Board ruled as follows:

- (1) The Board would not consolidate the first referral or the second referral with the section 63 and subsection 1(4) application;
- (2) The Board would not permit Local 607 to expand the grievance giving rise to the first referral and would not allow Local 607 to add Mr. Firman's clients as respondents in the first referral.
- (3) The Board would proceed to hear the section 63 and subsection 1(4) application since it was satisfied the respondents were provided with adequate particulars and adequate notice of the proceeding;
- (4) Based on the representations of Mr. Firman, the Board was satisfied that 444348 and Zanette Investments did not receive enough notice of the second referral and the Board determined that it would not hear the second referral at that time; and,
- (5) The Board denied the request for an adjournment.

The reasons for its rulings are set out below.

7. The Board was satisfied that it should not consolidate the first referral with the section 63 and subsection 1(4) application in circumstances where the liability issue had been determined and all that remained was the determination of what damages were owing to Local 607 from Reno Zanette (1981) Ltd. It would be unfair to entities who were not parties to the first referral, such as 444348 and Zanette Investments, to have subsequent proceedings consolidated with the first referral. For similar reasons, it would be inappropriate to expand the grievance giving rise to the first referral and to add 444348 and Zanette Investments as parties to the first referral. The Board made it clear to the parties that it would determine the section 63 and subsection 1(4) application on the evidence and submissions made in the context of that proceeding and would not rely on any evidence that had been called to date on the damages issue.

8. In arguing the Board should grant his clients an adjournment, Mr. Firman focused on the following matters. He submitted that the letter requesting section 63 and subsection 1(4) relief lacked particularity, that his clients had not received enough notice of these applications and of the second referral, that he was unavailable to attend for some of the days scheduled for the hearing, that the dates were fixed without his clients being consulted and that his clients should have the benefit of a Board Officer. The Board was satisfied that the section 63 and subsection 1(4) application made by Local 607 did not lack particularity. Applicants in such cases are not in a position to

do much more than provide the name of an entity and claim relief under the relevant provisions. Given the nature of the provisions relied upon, it is the respondents that possess the knowledge of the facts. This is, of course, why the Act obliges respondents to adduce all facts within their knowledge that are material to the allegations and why the Board, as a matter of procedure, requires respondents to call their evidence first. Although Mr. Firman and counsel for Local 607 discussed the case in early May, 1987, which incidentally resulted in Mr. Wahl providing Mr. Firman with a considerable amount of material relating to the case, there was no indication that Mr. Firman requested particulars for the section 63 and subsection 1(4) application. The Board was also satisfied that 444348 and Zanette Investments received sufficient notice of the section 63 and subsection 1(4) application. Mr. Rino Zanette, a part owner of Zanette Investments, was present with counsel at the December 1986 hearing when Local 607 first made its request for section 63 and subsection 1(4) relief against 444348, Zanette Investments and others. Counsel for Rino Zanette's company at that time undertook to provide counsel for 607 with the correct names and addresses for all of the respondents. Robert Zanette, the owner of 444348, lives with his parents. In these circumstances, we found it very difficult to accept that the representatives of 444348 and Zanette Investments were unaware in December, 1987, that Local 607 intended to seek section 63 and subsection 1(4) relief against those entities. In any event, the Board was advised that 444348 and Zanette Investments received notice from the Board of the section 63 and subsection 1(4) application on April 30, 1987. Discussions between Mr. Firman and his clients occurred on May 4, 1987 and the replies that were filed to those applications were dated May 4, 1987 in which the respondents denied there was any merit to the applications. Since these events occurred well before the hearing date of May 19, 1987, the Board was satisfied that 444348 and Zanette Investments received sufficient notice of the hearing. These respondents, however, did not receive notice of the second referral until shortly before May 19, 1987. Although the obvious intention of the Legislature is to have such referrals heard quickly, the Board was satisfied that 444348 and Zanette Investments did not receive sufficient notice of the second referral. The Board advised the parties that it would not consolidate the second referral with the section 63 and subsection 1(4) application and would not deal with the second referral at that time.

9. The Board generally does not consult with the parties in fixing the initial dates for a hearing but often will consult when setting continuation dates. For 444348 and Zanette Investments, the dates of May 19, 20 and 21 were the first days they were given notice of and the fact they were not consulted regarding those dates is inconsistent with neither the Board's practice nor the requirements of natural justice.

10. Since the Board determined it would not consolidate the section 63 and subsection 1(4) application with the first referral, there was no need, as counsel had requested, to adjourn the proceedings to give Mr. Firman's clients the opportunity to see if that matter could be resolved with the assistance of a Board Officer. The Board did not appoint a Board Officer in the section 63 and subsection 1(4) application to assist the parties. In the Board's view, this was not a basis for adjourning the proceeding given the circumstances before us. 444348 and Zanette Investments based its adjournment request in this submission simply on the ground that the Board did not exercise its discretion in favour of appointing a Board Officer. Without some indication that the intervention of a Board Officer would likely serve a useful purpose, and Mr. Firman provided us with no such indication, the Board was not prepared to adjourn the proceedings merely because a Board Officer had not been appointed.

11. Although available for May 19, 1987, Mr. Firman argued his clients were entitled to an adjournment since he would not be available due to previous commitments on May 20 and May 21, 1987. He advised the Board that on May 20 he had an arbitration hearing and on May 21 he had a commitment out of town. Without asking for the details of the out of town commitment on May

21, the Vice-Chair asked counsel if it was possible to make other arrangements for the 21st and counsel indicated that that was possible. From that point on, the focus of the submissions centred on Mr. Firman's commitment to attend the arbitration proceeding on May 20, 1987. As noted earlier, Rino Zanette appeared at the hearing without counsel. He advised the Board that his previous counsel was unavailable since he recently married and was on his honeymoon. For this reason, Rino Zanette took the position that he was unable to proceed without legal counsel and requested an adjournment. Local 607 opposed both requests for an adjournment.

12. Subsection 102(13) of the Act and subsection 82(1) of the Board's Rules of Procedure provide as follows:

102.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

82.-(1) The Board may, if it considers it advisable in the interests of justice, adjourn any hearing for such time and to such place and upon such terms as it considers fit.

13. The following excerpt from *Catalyst Technology (Canada) Ltd.*, [1987] OLRB Rep. June 803 at page 805 comments on the Board's practice when faced with adjournment requests:

The usual practice of the Board is to grant an adjournment only on the consent of all of the parties to a proceeding, or where a request for an adjournment is based on circumstances which are beyond the control of the party making the request and where to proceed would seriously prejudice such party. See, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, in which the Board wrote, in part, as follows (at paragraph 7):

...The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the Statutory Powers Procedures Act, R.S.O. 1980, c. 484). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. 1036, at paragraph 8, the Board stated:

"...The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

5. The Board policy with respect to adjournments has been capulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal ¶70 CLLC 14,024) wherein the Board stated: '... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness...'"

The powers of the Board with respect to adjournments were confirmed by the

Ontario Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

“Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.* [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act* 1971 (Ont.) c.47, and afford the parties the opportunity to be present and be represented if they wish by counsel. But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

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It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex. p. Kynock, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process...”

In *Nick Masney*, *supra*, and *Re Flamboro Downs Holdings Ltd.*, *supra*, the Courts found that there had been no denial of natural justice in circumstances where the Board denied adjournment requests because of the unavailability of counsel.

14. When the dates in May were being considered, a representative of Rino Zanette (1981) Ltd. was consulted and that firm received sufficient notice of the proceeding. By telex dated April 29, 1987, Mr. Coccimiglio advised the Board that the firm of Weiler, Maloney, Nelson no longer represented Mr. Rino Zanette. Even though Rino Zanette was unable to obtain counsel from that firm, there was no indication that any effort was made to obtain another lawyer. Mr. Firman apparently agreed to take the case with the knowledge of the previous commitments and there was no indication that Mr. Firman had made any attempt to make some other arrangements for the arbitration case. This was clearly a case where parties were requesting an adjournment either for their convenience or the convenience of counsel. If such considerations were to be determinative in

dealing with adjournment requests, it would take forever to litigate cases before the Board. After considering the nature of the proceeding, the interests of the parties, and the reasons for the adjournment request, the Board was satisfied that this was not an appropriate case to exercise its discretion in favour of granting an adjournment. After making its ruling, the Board advised Mr. Firman that it would be prepared to accommodate him, if he was agreeable, by sitting late on the 19th, sitting in the evening of the 20 so that Mr. Firman could attend his arbitration case and then perhaps starting earlier on the 21st. All parties agreed to this suggestion. However, it was unnecessary to actually follow it for by the end of the hearing on the 19th, Mr. Firman advised the Board that he was able to secure the consent of the other side to adjourn the arbitration case.

15. After the Board made its rulings regarding the preliminary matters, Mr. Firman asked for and was granted some time to have discussions with counsel for Local 607. After a short time, Mr. Firman advised the Board that his clients were ready to proceed and he began to call his evidence. By mid-morning on the 21st, 444348 and Zanette Investments had completed calling their evidence. At that time, Mr. Firman requested that the matter be adjourned in order that he could keep the commitment he had referred to on the 19th. The Board indicated to Mr. Firman that on the 19th it had ruled against the request for an adjournment and had understood that he could take care of his conflict on the 21st. Since the Board was never advised of the nature of Mr. Firman's conflict on the 21st, the Board indicated to him that, if he so desired, he could advise the Board of his reasons for requesting an adjournment. Mr. Firman indicated that he had a meeting out of Thunder Bay to discuss a grievance with a client that might possibly go to arbitration and that this meeting had been cancelled once before. Local 607 opposed the adjournment. After recessing to consider the adjournment request, the Board advised Mr. Firman that his request for an adjournment was denied. This was clearly a situation where counsel requested an adjournment simply for his own convenience. After considering the interests involved and the reason for the requested adjournment, the Board was satisfied that there was no legitimate basis to warrant an adjournment at that stage of the hearing.

16. Having determined it would proceed, the Board called on Rino Zanette to give evidence. Rino Zanette had advised the Board earlier that day that he had talked to a lawyer in the firm of Weiler, Maloney and Nelson who had told him that he would be able to attend the hearing on ten minutes notice on May 21. When it was time to give his evidence, Rino Zanette asked for some time to call his lawyer and the Board accommodated him. Over the next hour, Rino Zanette made a number of calls to the lawyer's office and informed the Board of the responses he received. When he first called, he was advised the lawyer was at an arbitration hearing. When he called a second time, he was told the lawyer was on a long distance telephone call. After calling again, he was told that the office did not know where the lawyer was. At approximately 11.30 a.m., the Board advised Rino Zanette that it would accommodate him by taking an early lunch break and would return at 12.30 p.m. to continue the case whether counsel appeared for him or not. At 12.30 p.m. Mr. Paul Jasiura of Stasiv, Mitton & Smith appeared to represent Rino Zanette (1981) Ltd. and Sault Holdings. Mr. Jasiura indicated his retainer was limited to representing those respondents while Rino Zanette was testifying. The Vice-Chair advised Mr. Jasiura of the nature and stage of the proceeding and the hearing continued.

17. Reference to two matters which occurred during the May hearings are worth noting at this point. When the preliminary matters were argued on May 19, 1988, and when Mr. Firman began to argue about the appropriateness of having his clients make parties to the first referral, the Vice-Chair asked whether it was possible for the parties to agree to an amendment of the second referral in order to avoid much of the preliminary argument. Both Mr. Firman and Mr. Wahl indicated that their clients would not be prepared to agree to such an amendment. With both parties unprepared to agree, the proceeding continued.

18. At the end of the hearing day on May 21, the cross-examination of Rino Zanette was not completed. The Vice-Chair obtained some dates for the continuation of the hearing and offered them to the parties. Mr. Jasiura and Mr. Wahl left the room to call their office in order to check out the dates. Mr. Firman remained in the hearing room and examined his calendar. Prior to the other counsel returning to the room, Mr. Firman advised the Board that he had two conciliation meetings that were not continuations scheduled on the days offered by the Board. The Vice-Chair expressed the view that the panel may not view that type of a conflict as a sufficient basis for not proceeding on those days. Mr. Firman indicated he hoped the Board would recognize that, although he was in a firm, he was realistically a sole practitioner since he was the only member in his firm who did labour work. The Vice-Chair indicated that the discussion should await the return of the other counsel. When the other counsel returned, Mr. Wahl advised that he was not available for the suggested dates as a result of vacation plans. Mr. Jasiura indicated as well that he was on vacation at that time. The Board was advised that both vacations had been planned for some time and involved trips away from home. Taking into account the vacation plans of the two counsel as well as Mr. Firman's difficulties with the dates, the Board determined that it would not schedule the continuation of the hearing on those days. The Board then offered the parties the dates of August 5, 6 and 7 and all parties, including Mr. Firman, agreed that those dates were acceptable.

19. On August 4, 1987, Mr. Jasiura advised the Board that Rino Zanette had been hospitalized. Local 607 was not prepared to consent to an adjournment of the hearing days scheduled for early August. When the hearing resumed on August 5, Mr. Jasiura asked for an adjournment and indicated he would be prepared to call evidence in support of the requested adjournment. Since Local 607 continued to oppose the adjournment, Mr. Jasiura called Dr. A. L. Moulson to give evidence. Dr. Moulson was cross-examined extensively by Mr. Wahl. We do not propose to detail the evidence of Dr. Moulson. Very briefly, Dr. Moulson has been Rino Zanette's family physician and neighbour for many years. During the evening of August 3, 1987, Rino Zanette contacted Dr. Moulson at his home and after describing how he felt, Dr. Moulson immediately arranged for his admission to McKeller Hospital. Rino Zanette was diagnosed as having uncontrolled hypertension. After examining Rino Zanette on August 4, Dr. Moulson was of the view that Rino Zanette's blood pressure showed abnormal swings making him susceptible to a stroke or a heart attack. Dr. Moulson described the treatment Rino was receiving and expressed the opinion that he would not be discharged from the hospital until early in the following week. In making his argument, Mr. Wahl argued there was no evidence to support the adjournment request. He suggested the Board continue with the cross-examination at the hospital and that Rino Zanette's absence was further evidence in support of his contempt. After entertaining the parties submissions, the majority of the panel, Mr. H. Kobryn dissenting, ruled that it would adjourn the hearing as it related to the section 63 and subsection 1(4) application. The majority was satisfied that Rino Zanette had a medical problem requiring hospitalization. Continuing the hearing at the hospital would not be conducive to controlling Rino Zanette's blood pressure.

20. Virtually on the eve of the August 4 hearing date, the Board received the following letter from Mr. Firman dated July 29, 1987:

Dear Mr. Aynsley,

Further to the hearings in this matter which have been commenced against 444348 Ontario Limited and Zanette Investments Limited, we hereby request the panel of the Board that is seized with this matter to consider our submission contained herein that the panel is *biased* against the Respondents, 444348 Ontario Limited and Zanette Investments Limited, such that it cannot and should not continue with this hearing. We therefore respectfully request that the panel dismiss the action against 444348 Ontario Limited and Zanette Investments Limited, or *alternatively*, refer this matter to another panel of the Board for determination.

The grounds upon which this motion is made are as follows:

1. These proceedings apparently commenced with the filing of a grievance by the Labourers' International Union of North America, Local 607 against Reno Zanette Limited and Reno Zanette (1981) Ltd. and which grievance was filed on October 30, 1985. It should be noted that at this point in time, i.e. October 30, 1985, 444348 Ontario Limited and Zanette Investments Limited, were *not named as Respondents*.

2. The aforementioned grievance dealt with an alleged violation of the Collective agreement at various construction projects listed in Schedule "A" to the grievance and specifically:

- (i) Commercial Building next to Marostica Motors, 10th Avenue, Thunder Bay;
- (ii) Arnone Transport Limited garage, Thunder Bay;
- (iii) CNR Hostel, Atikokan;
- (iv) Commercial Building, 1313 Brown Street, Thunder Bay;
- (v) Motel Valencia, 105 Main Street, Atikokan.

3. The matter was then referred as a grievance to arbitration under Section 124 of the construction industry provisions of the *Labour Relations Act* and only Reno Zanette (1981) Ltd. was named as the Respondent. My clients, 444348 Ontario Limited and Zanette Investments Limited, were not named as Respondents at that time. In addition, the Board gave the matter a file number 2058-85-M.

4. Subsequently, in November of 1985, Mr. W. Jackson, an Officer of the Board, was appointed to confer with the parties to endeavour to effect a settlement of the grievance in this case. The letter from the Board appointing Mr. Jackson was dated November 18, 1985, and was addressed to the Labourers International Union of North America, Local 607 and Mr. Ronald Davis as Business Representative. In addition, the Board by way of letter of November 18, 1985, served a formal Notice of Hearing on the Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicating that the Hearing of this matter would occur on November 29, 1985, in Toronto.

My clients, 444348 Ontario Limited and Zanette Investments Limited, *had not been named as Respondents to this point in time and therefore did not have the opportunity to avail themselves of the services of Mr. W. Jackson in an effort to resolve the grievance.*

It is submitted that, with a matter as complex as this, my clients should have had the opportunity to have the services of a settlement officer, particularly when my clients were not present when proceedings commenced and were not named as Respondents at that time. Therefore, it would be difficult, if not impossible, for my clients to attempt to discuss settlement with the Applicants in the absence of a settlement officer, *when evidence had already been tendered about which my clients had no knowledge.*

In addition, settlement services of the Board are considered so integral a part of normal Board procedure, that to deprive any party of the right to such services is a *breach of natural justice and fairness.*

My clients, at the hearing of the Board on May 19, 20 and 21, 1987, asked the Board to appoint a settlement officer to confer with the parties but this request was *refused* by the Board, no particular reasons being given except that the Board had discretion as to whether or not settlement services were to be granted.

5. The Hearing originally scheduled for November 29, 1985, was subsequently rescheduled to occur on December 18, 1985, and once again, only Reno Zanette (1981) Ltd. was named as the Respondent.

6. The Board heard this matter and issued a decision on December 27, 1985, to the parties, Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicating that it was not prepared to grant the adjournment to the Hearing that was requested by counsel for the Respondent at that time. It should also be noted that apparently the Respondent had filed documents asking for judicial review of a different proceeding of the Board and which decision was rendered on January 27, 1984.

7. By way of decision dated January 27, 1986, the Board in a matter involving the Labourers International Union of North America, Local 607 as Applicant and Reno Zanette (1981) Ltd. as Respondent indicated that the Respondent Company was bound by the Provincial Collective Agreement and was required thereby to utilize members of the Applicant Union for construction labourers' work for all sectors with respect to the six projects delineated, specifically:

- (i) CNR Hostel, Atikokan near 109 White Street;
- (ii) Commercial Building across the street from Marostica Motors, 10th Avenue, Thunder Bay;
- (iii) Arnone Transport Limited garage, 235 Queen Street, Thunder Bay;
- (iv) Halfway Motors Limited, Memorial Avenue, Thunder Bay;
- (v) Commercial Building, 1313 Brown Street, Thunder Bay;
- (vi) Building near the Valencia Restaurant, 105 Main Street, West, Atikokan.

Again, *only Reno Zanette (1981) Ltd. was named as the Respondent at that time* and with respect to that decision and accordingly, 444348 Ontario Limited and Zanette Investments Limited, *did not have an opportunity to participate in those proceedings, never having been made a party as Respondent to them.*

By that same decision, the Board deferred dealing with the amount of damages in the hope that the parties could agree upon an amount and if they were unable to do so, the Board was to remain seized of the matter of damages.

Thus, at this point in time, it was determined that Reno Zanette (1981) Ltd. was a successor or related employer to Reno Zanette Limited and only the question of damages was to be assessed. *Of significance is the fact that the question of liability had already been determined, only the question of damages remained, and my clients, 444348 Ontario Limited and Zanette Investments Limited had not been named as parties to the proceedings or notified of the proceedings.*

8. On March 12, 1986, Mr. Steven Wahl wrote to the Ontario Labour Relations Board with respect to this file number 2058-85-M indicating that the parties had not been successful with respect to the issue of quantum of damages and therefore requested that the matter be relisted for Hearing on a date to be fixed by the Registrar *in consultation with the parties.*

My clients, 444348 Ontario Limited and Zanette Investments Limited, were *not consulted by Mr. Wahl or the Board* with respect to the dates to be set by the Registrar because of course they were *not* parties to the proceedings. To therefore set dates at this point in time without consultation with my clients and establishing a date which is suitable to all *is inequitable and a breach of natural justice.*

9. On June 27, 1986, Mr. Paul Gordon of Gordon, Carter & Johnson, solicitors in Thunder Bay, wrote to Mr. Steven Wahl of Koskie & Minsky confirming that an agreement had been made to adjourn the proceedings at that time since Mr. Reno Zanette had been confined to a medical facility in Centre City, Minnesota, and was therefore unable to participate in the Hearing scheduled by the Board for June 30, 1986. a number of conditions were also set out in that letter of confirmation which listed several undertakings of Mr. Gordon on behalf of Reno Zanette (1981) Ltd.

444348 Ontario Limited and Zanette Investments Limited, were *not* named as Respondents at

this point in time and therefore *were not included in any adjournment proceedings or in any consent to adjournment of the proceedings.*

10. Mr. Steven Wahl subsequently wrote to the Board on July 31, 1986, indicating that he wished the matter of quantum of damages to be set down by the Board for hearing on September 8, 9, 15, 16, 17 or 29, 1986.

444348 Ontario Limited and Zanette Investments Limited were not consulted with respect to the suggested dates and were not listed as parties to the proceedings at this time. The Board subsequently issued a decision on November 19, 1986, dealing with the refusal of Mr. Reno Zanette to answer several questions put to him at the Hearing scheduled and heard on October 27, 1986. Since the matter was not concluded at that time the Board decided that the issue would continue on December 15, 1986, in Thunder Bay and the Board would hear further submissions from the parties on the issue of whether or not the Board should find Mr. Reno Zanette in contempt of the Board and if so, what penalty it would impose on Mr. Reno Zanette.

11. On January 6, 1987, Mr. Steven Wahl wrote to the registrar indicating that the testimony at the Hearing on December 15, 1986, revealed that other corporations were associated or related businesses or activities under common direction and control with Reno Zanette Limited and/or Reno Zanette (1981) Ltd. with respect to their construction activities and specifically, these corporations were:

444348 Ontario Limited;
Zanette Investments Limited; and
Sault Holdings Limited.

At that time, Mr. Wahl requested the Board to amend the operative grievance to assert a violation against each of the above-mentioned corporations jointly and severally and that the Board apply Section 63 and/or 1(4) of the *Labour Relations Act* and grant the appropriate relief. He also requested that notice be served on each of the above corporations.

This was the *first time* that a request had been made to add 444348 Ontario Limited and Zanette Investments Limited as parties to this proceeding. This of course was done at a time *after* the liability with respect to the grievance had been determined and the only matter to be decided was the quantum of damages. *It is submitted that it is too late in the day for the Union to attempt to expand the grievance at this point in time when in fact my clients, 444348 Ontario Limited and Zanette Investments Limited, were never notified or named as Respondents prior to this time, and therefore did not have an opportunity to defend against the grievance.* To allow these parties to be added at this point in time would be a *breach of natural justice* since of course the parties do not know the evidence that has been introduced against them or Reno Zanette (1981) Ltd. to date.

In that same letter, Mr. Wahl indicated that the Board was to resume the Hearings on March 25, 26 and 27, 1987, but my clients, 444348 Ontario Limited and Zanette Investments Limited, still did *not* receive a copy of Mr. Wahl's letter of January 6, 1987, at this time and they were *never informed* of the resumption of Hearings on March 25, 26 and 27, 1987.

12. By way of letter of February 4, 1987, Mr. Wahl indicated that he had requested that the grievance be expanded to include 444348 Ontario Limited and Zanette Investments Limited and Sault Holdings Limited and the construction projects involved were also expanded to include 725 S. James Street, Thunder Bay, Ontario and an apartment building construction project at 800 Gordon Avenue, Thunder Bay, Ontario. The top portion of this letter indicates that the letter was "Delivered" to all of the companies named but 444348 Ontario Limited and Zanette Investments Limited *never did receive such letter and it was not delivered to them.*

Mr. Wahl also indicated in that same letter that the Hearing was to be scheduled on March 25, 26 and 27, 1987, and once again, my clients had *no input* into the time of the Hearings with respect to this matter.

13. On April 30, 1987, my clients, 444348 Ontario Limited and Zanette Investments Limited, were served with registered documents which indicated that the Hearing in his matter was scheduled to resume in Thunder Bay on May 19, 20 and 21, 1987, and in addition, also included

was a copy of the original letter of February 4, 1987, from Mr. Wahl and which date had been crossed out as well as the word "Delivered" crossed out and in its place, was the date April 29, 1987, and the word "Registered".

However, once again, my clients were *not involved in the setting of the dates for this matter and such dates appear to have been suggested unilaterally by the Union.*

To the date of May 19, 1987, my clients were only informed that the Hearing in this matter was to continue in Thunder Bay on May 19, 20 and 21, 1987, and that the matter involved the issue of damages arising by way of a grievance alleging a violation of the Collective Agreement as well as a Section 63 and Section 1(4) application by the Union. My clients had only received this information when served on April 30, 1987, and therefore, because of the complexity of the matter and the need to discuss the issue more fully with counsel as well as meet with a settlement officer to discuss the possibility of resolution, an adjournment was requested to obtain additional time and documentation to fully deal with the case. In addition, I had a conflict with other matters on May 19, 20 and 21, 1987, and therefore asked the Board to adjourn the matters at this time. However, the response of the Board was only to *refuse such request*, in spite of the above considerations.

14. To the date of May 11, 1987, my clients had *not formally received* a copy of the grievance which started these proceedings. In addition, my clients had *not participated* in any proceedings with respect to the grievance, never having been set down as a party to the proceedings until *after* the question of liability against Reno Zanette (1981) Ltd. had been determined and *after* the question of quantum of damages was found to be not capable of resolution by other parties. To therefore allow the *grievance to be expanded* so as to include my clients as parties is an obvious *breach of natural justice* as well as being *contrary to any of the principles of grievance administration.*

15. Furthermore, at the hearing in Thunder Bay on May 19, 20 and 21, 1987, it was submitted to the Board that these dates were not convenient to me or to my clients and since such dates represent a continuation of the previous Hearing, it was submitted that the *Board practice* usually is to confer with the parties with respect to the establishment of dates which are mutually convenient. Such dates had *not* been established on a mutually-convenient basis on this occasion and therefore a request was made to adjourn the said proceedings for these reasons. However, the Board refused to grant such adjournment thereby resulting in further prejudice to my clients, 444348 Ontario Limited and Zanette Investments Limited because of the short notice given of the date of the hearing and because of the conflict referred to above.

16. I also submitted at the hearing on May 19, 1987, that the matter of a violation of the Collective Agreement as specifically set out in this grievance filed could not now be relitigated and could not involve my clients since they were never named as Respondents in the first instance. To allow my clients to be added as parties at this stage in the proceedings would be analogous to having a Supreme Court action decided on the basis of liability and then allowing multiple parties to be added *after* the question of liability has been decided. Simply put, this is so obvious a *breach of natural justice* as to not warrant any further comment.

However, the Board not only refused to consider this request but went further and *suggested to the Union that it should consider amending the grievance so as to add my clients, 444348 Ontario Limited and Zanette Investments Limited, as Respondents with respect to an alleged violation of the collective agreement and also to add to the job sites at which it was alleged the violations occurred.*

The Union subsequently, by way of letter of June 1, 1987, made such request to the Board.

It is submitted that to make such a suggestion to the Union is obviously a *breach of natural justice and unfair to the Respondents since one party is favoured over another.*

17. My clients have also not been given any particulars with respect to the Section 63 application for successor rights or the Section 1(4) related employer application nor have they any knowledge about the evidence introduced to date and since the Board procedure is to have the Respondent proceed first, my clients are *unfairly disadvantaged and prejudiced* in not knowing

the particulars which they are to address in any hearing, if they are to do so at all and in not knowing the evidence which has been introduced.

18. At the hearing on May 19, 20 and 21, 1987, the Board discussed further dates for continuation of the hearing. I indicated to the Board that certain suggested dates were not suitable because of prior work commitments; the Board disregarded such comments but considered and respected Union counsel's submission that certain dates were not suitable as a result of a family vacation that he had planned.

It is submitted that this fact is further *evidence of bias and breach of natural justice expressed toward the Respondents 444348 Ontario Limited and Zanette Investments Limited*. Simply put, the Board has expressed such animosity toward the said Respondents that any possibility for an unbiased decision is non-existent.

19. In summation, it is submitted that the Board should disqualify itself from any further hearings with respect to this matter as against the Respondents 444348 Ontario Limited and Zanette Investments Limited, because it is biased against the said Respondents and has made incorrect applications of law. In particular, the Board:

- (i) refused to allow the Respondents the opportunity to meet and consult with a settlement officer to attempt to resolve the matter;
- (ii) allowed the Respondents 444348 Ontario Limited and Zanette Investments Limited, to be named as respondents or alternatively become involved in the matter after the action had been commenced by the Union and after the question of liability had been determined against Reno Zanette (1981) Ltd. and when the question of quantum of damages was found to be not capable of resolution by parties other than my clients;
- (iii) allowed the grievance to be expanded and even suggested the same to the Union when the Respondents 444348 Ontario Limited and Zanette Investments Limited, were not named as parties in the initial grievance;
- (iv) compelled the Respondents 444348 Ontario Limited and Zanette Investments Limited to proceed with the hearings on May 19, 20 and 21, 1987, despite the fact that the same Respondents were only served with original documentation from the Board on April 30, 1987, and despite the fact that counsel retained by the Respondents had other work commitments for the said scheduled time of May 19, 20 and 21, 1987;
- (v) did not allow the opportunity to the said Respondents to participate in the setting of mutually-convenient dates for such Board hearings either with respect to the dates of May 19, 20 and 21, 1987, or further subsequent dates;
- (vi) has placed the said Respondents in an untenable and prejudicial position in attempting to carry on settlement discussions because the said Respondents *do not know the evidence that has been introduced to date and the damages that are allegedly said by the Union to have been put forth in evidence in prior proceedings before the said Respondents were added to the proceedings*. As a result, the said Respondents have been unable to discuss, with any accurate knowledge, possible settlement with the Union since they have no knowledge of the evidence that had been introduced involving either the question of liability or the question of damages prior to the said Respondents' being added to the action.

.....

For all of these reasons, it is submitted that this proceeding by the Union is so *prejudicial, inequitable and a breach of natural justice* to the said Respondents as to require that the case be dismissed against the said Respondents altogether with respect to the claim by the Union of successor rights under Section 63 and related employer allegations under Section 1(4) of the *Labour Relations Act* and also with respect to any damages arising from grievances filed by the Union.

20. With respect to the question of *bias and breach of natural justice*, the Board is referred to the following excerpt from *Natural Justice in Canada* by Wesley Pue (Butterworths, 1981) at page 119:

"In order that a person may have a fair hearing it is essential that the decision-maker not approach the particular problem with a predisposition to decide one way or the other: it is necessary that a tribunal should be impartial, fearless and free from bias so as to be able to do its work without fear or favour and with an objective view of things. Canadian Law thus enforces the rule against bias. Although often referred to be the maxime *nemo judex in re sua* (which literally prohibits a person from being judge in his own cause), the prohibition extends to prevent a person from assuming the role of a judge if there is any reason whatsoever to suspect him of partiality."

It is submitted that the test is whether a reasonable person would believe there to be a real danger of bias (see *Re Greyhound Lines of Canada Ltd. v. Motor Transport Board* (1977) 4 Alta. L.R. 280 (Alta. S.C.A.D.) referred to at page 120 of Pue's book.

The law imposes a duty on anyone called upon to decide anything under a statute to *act in good faith and with an open mind not foreclosed to argument*. (*Re Franklin v. Minister of Town and Country Planning* (1948) A.C. 87 (H.L.); (*Board of Education v. Rice* (1911) A.C. 179 (H.L.)).

21. In cases other than those involving allegations of direct pecuniary interest, the courts have defined their role as being one of ascertaining whether the facts complained of could give rise to "*a reasonable apprehension of biased appraisal and judgement of the issues to be determined*".

22. For all of these reasons, it is suggested that the said Respondents cannot obtain a decision from this tribunal which is free of any and all bias for all of the reasons stipulated. As a result, it is respectfully submitted that this action against the said respondents 444348 Ontario Limited and Zanette Investments Limited, be dismissed or alternatively, that the matter be referred to another panel of the Board.

Yours truly,
G. Lorne Firman

21. At the hearing on August 6, 1987, the Board entertained the representations of 444348 and Zanette Investments, and Local 607 with respect to the issues of bias and breach of natural justice. After consulting with Rino Zanette, Mr. Jasiura agreed on behalf of his clients to the following procedure. Mr. Jasiura would relay to Rino Zanette the arguments made by the other counsel and Rino Zanette would have until August 14 to make submissions to the Board in writing on those issues. Rino Zanette did file his written submissions with the Board prior to the deadline.

22. Mr. Firman did not attend the hearing on August 5 and 6. Mr. Buset, a lawyer in the same firm, appeared to represent 444348 and Zanette Investments. Although Mr. Buset did not withdraw the allegations contained in Mr. Firman's letter of July 29, the focus of his comments were directed to one natural justice issue. It was his submission that this panel should not deal with the section 63 and subsection 1(4) application as against his clients since it was the same panel before whom Rino Zanette refused to answer questions. It was suggested that the panel would be frustrated with Rino Zanette and that this would impact on the Board's perception of his credibility. It was argued that this frustration would spill over and affect his clients. It was for this reason that Mr. Buset suggested the present panel should not deal with the section 63 and subsection 1(4) application.

23. In arguing the panel was biased and breached the rules of natural justice, Mr. Buset was placed in a difficult position. He had not participated in the May 1987 hearings and did not prepare the letter of July 29. Mr. Buset was asked why the challenge to this panel based on his oral submission had not been made in May rather than after three days of hearing and on the eve of the hear-

ing in early August. Mr. Buset was quite surprised by this question since he had understood that a challenge had been made to the present panel in May. When asked why it took over two months to make the allegations contained in the letter of July 29, Mr. Buset said he had no explanation for the delay. Regarding the appointment of a Board Officer, Mr. Buset was unable to answer the questions of why a settlement officer was not requested during the period of over two months between hearing dates or why there had not been some indication from his clients that the appointment of a Board Officer would serve a useful purpose. Mr. Buset was quite frank in admitting he was unaware of much that occurred at the May hearing. He was unaware that the Board offered to accommodate Mr. Firman's arbitration conflict by rearranging the hours of the hearing. He was not aware that the Board accommodated Mr. Jasiura as well as Mr. Wahl when canvassing continuation dates on May 21. When he was advised of the Board's rulings in May favouring his clients, of which he was unaware, and asked whether such information affected his submissions, Mr. Buset had no comment. It is unnecessary to detail any further the fact that Mr. Buset was not in the best position to argue the bias and breach of natural justice issues.

24. The submissions of Rino Zanette were as follows:

Re File Number 2058-85-M and 0343-87-G. I wish to submit the following on the issue of bias. I fought long and tough in the earlier proceedings on behalf of Zanette 1981 Limited. Adverse findings were made against me then, including contempt proceedings. Now for Fault [sic] Holdings the Board hearing s.63 and 1(4) should not assess my credibility and the merits of the case with their minds being tainted by previous determinations against me personally and my other companies. The bias is especially noticeable as against Board Member Mr. Koburn [sic] who dissented even on a request for adjournment based on medical grounds. He was on the Board which determined the successor rights in the earlier proceedings to which established successor rights between Zanette Limited and Zanette 1981 Limited.

Zanette 1981 Ltd. and Fault [sic] Holdings Ltd. per Rino Zanette.

25. After considering the submissions contained in the July 29 letter, the oral submissions made on August 6 and Rino Zanette's written submission, the Board advised the parties orally on August 17, the next hearing day following August 6, that it denied the motion made by 4443480 and Zanette Investments for the dismissal of the applications and the request to refer the matter to another panel for determination. The reasons for this ruling are as follows.

26. Dealing first with the oral submission made by Mr. Buset, the Board was satisfied that there was no reason to disqualify itself simply because the panel had to deal with a situation where Rino Zanette refused to answer some questions. Counsel for 444348 and Zanette Investments was aware of this situation prior to the hearing in May yet this matter was only raised after three days of hearing and on the eve of the hearing in early August. The panel was not frustrated by Mr. Zanette's conduct. He appeared in December, 1986 and answered all relevant questions put to him and at that time the Board determined it would not hear argument on the contempt issue until the end of the proceedings. Credibility may be an issue in the section 63 and subsection 1(4) part of the hearing. However, the Board was satisfied that it would be in a position to make its factual determinations simply on the basis of the evidence it heard during the hearing on the section 63 and subsection 1(4) application without regard to what occurred when it heard evidence relating to the first referral. With regard to Rino Zanette's written submissions, the Board was satisfied that Mr. Kobryn's participation in a January, 1984 decision which flowed from a hearing in which Rino Zanette did not attend and Mr. Kobryn's dissent regarding the adjournment request based on medical grounds in August 1987 should not cause this panel to disqualify itself.

27. Although counsel did not treat the allegations contained in the letter of July 29 seriously on August 6, the Board does consider such matters seriously and will briefly respond to them.

Most of the matters raised in the July 29 letter were contained in the May 11 letter and addressed at the hearing on May 19, 1987. The main concern expressed in the July 29 letter relates to Local 607's request to expand the grievance giving rise to the first referral and to add 444348 and Zanette Investments as parties to the first referral thereby making Mr. Firman's clients a party to a proceeding in which liability had already been determined. After the Board made its rulings on May 19, Mr. Firman indicated he was confused and the rulings were repeated for his benefit. The main thrust of the July 29 letter indicates that Mr. Firman continued to fail to appreciate the nature of the Board's rulings. On May 19, the Board refused Local 607's request to expand the grievance giving rise to the first referral and ruled it would not add Mr. Firman's clients as parties to the first referral. The Board also ruled it would not consolidate the section 63 and subsection 1(4) application with the first referral. Since it accepted Mr. Firman's submission that his clients did not have adequate notice of the second referral, the Board ruled it would not proceed to hear that referral at that time. The Board made it quite clear that the only matter it would proceed with as against 444348 and Zanette Investments was the section 63 and subsection 1(4) application. The Board specifically noted that any evidence it heard prior to May, 1987 would not be relied on in the section 63 and subsection 1(4) proceeding. This resulted in Local 607 introducing a number of exhibits in the section 63 and subsection 1(4) matter which it had filed previously during the hearing of the first referral. Simply put, the Board did not tie in Mr. Firman's clients to the first referral. In fact, the proceeding against Mr. Firman's clients was kept quite separate from the first referral. When the Board eventually ordered a specific amount of damages in the first referral, it did not make the order against Mr. Firman's clients. Therefore, with regard to the main thrust of the submissions set out in the July 29 letter, the factual basis relied upon in support of the allegation does not exist. The Board was satisfied it did not breach the rules of natural justice in the manner in which it proceeded with the section 63 and subsection 1(4) application against 444348 and Zanette Investments.

28. The Board did make some rulings on May 19 and 21 which did not favour Mr. Firman or his clients. It determined that Mr. Firman's clients had adequate notice and particulars of the section 63 and subsection 1(4) application. It determined that it would not adjourn the hearing in order to appoint a Board Officer, nor would it adjourn the proceeding because the dates were not set in consultation with Mr. Firman's clients or because Mr. Firman had a conflict. The reason for these rulings were provided earlier and need not be repeated. To the extent that the letter of July 29 implicitly requests reconsideration of these rulings, such request was denied. Section 106(1) of the Act provides the Board with jurisdiction to reconsider its decisions and the Board requires that such requests be made promptly. In order to avoid prolonged litigation, the Board exercises its reconsideration power carefully. In the following paragraph in *The Corporation of the City of Ottawa*, [1982] OLRB Rep. Nov. 1698, the Board explains its practice when faced with reconsideration requests:

Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise, and not to permit relitigation of issues by a party which, having received an adverse decision, now feels that a stronger case could have been presented.

The matters referred to in the July 29 letter as noted above were raised and argued on the hearing dates in May. The implicit requests for reconsideration were made over two months after the rulings were made with no explanation for the delay. Since no new matters were raised relating to the issues noted above, the Board found that there was no basis for it to reconsider its rulings.

29. To the extent that Mr. Firman relies on the Board's rulings as evidence of bias or breaches of natural justice, the Board notes the following. Some of the Board's rulings on the preliminary issues favoured Mr. Firman's clients, some did not. With respect to all of its rulings, the

panel considered the circumstances, the parties' submissions and, after recessing to consider the matters, determined what was appropriate in the circumstances given the statute we administer and Board practice. The Board was not convinced that any of its rulings demonstrated bias or breached the rules of natural justice.

30. There are two other matters raised in the July 29 letter which require some comment. The Board did not suggest to Local 607 that it amend the grievance giving rise to the first referral as alleged in paragraph 16 of the July 29 letter. The Vice-Chair made a comment to Mr. Firman while he was making his submissions and the comment concerned the grievance giving rise to the second referral in which Mr. Firman's clients were named. The comment was made in the hope the parties would agree to amend the second grievance in order to avoid spending time on preliminary matters. Mr. Firman was not receptive to the suggestion nor was Mr. Wahl and the submissions continued. In making the suggestion, the Board was attempting to move the proceedings along. Local 607 did subsequently apply to amend the grievance giving rise to the second referral. However, the Board never did deal with the second referral. The comments at paragraph 18 of the July 29 letter are also inaccurate. When the discussion of further dates occurred, the Board considered the difficulties each counsel had. What was determinative for the Board was that counsel for Local 607 and Mr. Jasiura had conflicts as a result of planned vacations. The Vice-Chair had earlier expressed the view to Mr. Firman that his conflicts might not cause the Board to disregard the suggested dates. Given the nature of the conflicts of the other counsel, the Board did not have to decide whether Mr. Firman's conflicts alone would cause it to reject the dates. The Board was satisfied that both of these matters did not support the allegation of bias and breach of natural justice.

31. Since the hearing on the section 63 and subsection 1(4) application was unable to proceed on August 5, 6 and 7 due to Rino Zanette's illness, the Board spent some time on August 5 and continuing on August 6 discussing possible continuation dates with counsel. A number of dates in the following months were canvassed. The only date all counsel could agree on was August 17. The Vice-Chair expressed the view that since counsel were unable to agree on dates, it appeared to the Board that dates would have to be fixed on a peremptory basis. When further efforts failed to obtain agreement on dates, the Board advised the parties that it would fix peremptory dates. The parties did not object to this procedure. The Registrar subsequently advised the parties that the hearing would continue on August 17, 31, September 1, 22 and 23.

32. By at least August 13, 1987, counsel for Local 607 advised the Board he was unavailable on August 17, 31 and September 1, provided reasons for his unavailability and indicated further representations would follow. Subsequently, counsel for Local 607 advised the Board that all parties had agreed to adjourn the hearing and requested leave of the Board not to proceed on August 17, 31 and September 1. After considering the request, the Board advised the parties that it would not adjourn the hearing. The Board will usually adjourn a hearing on the consent of the parties. However, in this case, the dates in question had been fixed by the Board on a peremptory basis after it experienced considerable difficulty in obtaining the agreement of counsel to dates. Illustrative of the difficulty with counsel's schedules is the fact that all parties on August 6 indicated August 17 was acceptable but a week later Mr. Wahl had a difficulty with the day. Taking into account that the dates were set on a peremptory basis and the reasons for which Mr. Wahl requested the adjournment, the Board, as master of its own procedure, determined that it would not adjourn the hearing even in the face of the parties consent to do so. Before it would agree to adjourn peremptory dates, the Board would require exceptional circumstances which it found did not exist in this case. The parties attended with counsel on August 17, no discussion occurred concerning the denial of the adjournment and the hearing continued. The matter was not completed on August 17 and was to continue as previously scheduled on August 31.

33. When the hearing resumed on August 31, Rino and Robert Zanette requested an adjournment. Rino Zanette advised the Board that certain lawyers, including Mr. Coccimiglio, left the firm of Weiler, Maloney, Nelson and these lawyers advised him that they could not practice law until the 16th of September. On August 21, Mr. Coccimiglio again advised the Board that the firm of Weiler, Maloney, Nelson was not representing Rino Zanette in this matter. On August 27, the Board received a telex from Robert Zanette in which he advised the Board that he discharged his lawyer, required some time to retain new counsel and requested an adjournment. Mr. Firman called the Board on August 28 to advise that he will not be acting on behalf of Robert Zanette. At the hearing, Robert Zanette explained he was unhappy with the representation he was receiving from Mr. Firman and that after the hearing on August 17, he realized he had no confidence in Mr. Firman and discharged him. He discovered Mr. Firman had no construction experience and was unable to provide him with satisfactory answers to certain questions. Robert Zanette explained he was unable at that point to retain another lawyer. Robert Zanette advised the Board that Mr. Firman explained to him that he ran the risk of the Board proceeding even if he had no lawyer. Robert Zanette also advised the Board that he would not represent his companies at the hearing. At the hearing, Local 607 opposed an adjournment. After entertaining the parties submissions and after recessing to consider the matter, the Board orally ruled at the hearing that it denied both adjournment requests. The Board indicated that it considered each request and the grounds for each separately and concluded that the circumstances were such that it would be inappropriate to grant an adjournment.

34. In paragraph 13 of this decision, the Board referred to a number of cases which disclose the Board's practice concerning adjournment requests. Given the nature of the adjournment requests made on August 31, reference to two cases is warranted. In *Re Flamboro Downs Holdings Ltd.*, *supra*, the Divisional Court held that the Board's refusal to grant an employer an adjournment in circumstances where the employer had switched lawyers two days before the hearing and the recently retained lawyer was not available for the hearing did not amount to a denial of natural justice. In *Joe Portiss*, [1983] OLRB Rep. Sept. 1554, a complainant requested an adjournment on the ground that between the first and second day of hearing he had discharged his counsel and needed time to retain and instruct a new lawyer. The following comments and reasons of the Board for denying the adjournment are applicable to the circumstances before us.

It is the general practice of the Board not to grant an adjournment unless it is agreed to by the parties, except in extraordinary circumstances. Extraordinary circumstances would generally include unforeseen events beyond the control of a party, such as illness or difficulties in travel due to severe weather. The Board does not generally adjourn a hearing on the request of a party for time to seek legal counsel, particularly where that party had ample notice of the hearing and a reasonable time to retain and instruct counsel beforehand. In this case Mr. Portiss had, by his own admission, some nine days between his disagreement with his former counsel and the resumption of the compensation hearing. We do not see in these circumstances any reason to grant an adjournment merely because the complainant was not entirely satisfied with the Board's interim rulings. Among the items of dissatisfaction Mr. Portiss cited the failure of his counsel to adduce evidence to explain why Mr. Portiss voluntarily took a layoff from a job with Combustion Engineering. Given the Board's determination in paragraph 30 of its decision of July 11, 1983 that that event would weigh against Mr. Portiss in the assessment of compensation, we are satisfied that he was or should have been aware of that outcome over two months ago. In our view he had ample time to attempt to retain and instruct counsel, or to weigh and accept the alternative of completing the hearing with the lawyer he initially retained. The Board is also mindful of the prejudice which an indefinite adjournment could cause the respondent union, whose membership has obviously been divided by the ongoing controversy surrounding this complaint. Fairness to both parties and concern for the labour relations process require that this matter be disposed of without undue delay, in keeping with the Board's normal rules of procedure. For the foregoing reasons the Board ruled at the hearing that it would not depart from its normal procedures and that Mr. Portiss' request for an adjournment was denied.

35. As noted earlier, August 31 and September 1, 1987 were dates which the Board fixed on a peremptory basis. The hearing was at the stage where evidence had been called on behalf of Robert Zanette's companies and Rino Zanette's companies and Local 607 was about to call what was described as a little evidence. This was at least the third occasion during the course of the proceedings in which Rino Zanette requested an adjournment in order to obtain counsel. He appeared with counsel on August 17 and had adequate time to ensure he would have counsel for the remainder of the case. It was only after a number of days of hearing and when the matter was close to completion that Robert Zanette discharged his counsel. He took this action with the knowledge that the Board might not grant an adjournment. The Board was satisfied that Robert Zanette had reasonable time to retain and instruct counsel. In considering the interests of both sides, the Board determined that the circumstances did not warrant granting an adjournment. The hearing proceeded and was completed on September 1. Rino Zanette participated in the hearing and Robert Zanette, although present, elected not to participate.

36. Before turning to the substance of the section 63 and subsection 1(4) application, the Board will address three matters raised by counsel for Local 607. These matters concern the second referral and the contempt issue which were both raised in final argument and the issue of costs which came up earlier in the proceeding. The Board does not propose to set out the extensive and able submissions of counsel in these three areas.

37. Counsel argued that the Board should determine the merits of the second referral based on the evidence it had before it. Counsel appreciated that the Board ruled against consolidating the second referral with any other application before it earlier in the proceeding but submitted in final argument that it was now open to the Board to treat the second referral as having been heard together with the other applications. It was submitted that the respondents to the second referral are not prejudiced by such an approach and that a speedy determination of a section 124 application warranted the Board adopting such a procedure. The Board is satisfied that it would be inappropriate and unfair to the respondents in the second referral to adopt such an approach. As noted earlier, the Board determined on May 19, 1987 that it would not consolidate the second referral with the other applications before it since it was satisfied that the respondents did not receive adequate notice of that referral in the circumstances. At that time, the Board indicated it would not proceed to hear evidence relating to the second referral and at no time during the course of the evidence did a party request or did the Board indicate that it would hear the second referral together with the other applications. Therefore, the respondents were not adducing evidence with the knowledge that the matters were being heard together. In the normal case, procedural determination concerning the consolidation or the hearing together of matters are made prior to evidence being called. The respondents to the second referral did not agree to counsel's submission and absent agreement, the Board will not adopt the approach advocated by Local 607's counsel.

38. At the December 15, 1986 hearing, the Board determined it would entertain submissions at a later date relating to the issue of whether or not it should find Rino Zanette guilty of contempt in the face of the Board and, if so found, what penalty it should impose. Counsel for Local 607 forcefully submitted that Rino Zanette should be found guilty of contempt and incarcerated for a period of time. Counsel referred to the initial refusal to answer questions and also to Rino Zanette's subsequent conduct, specifically his constant attempt to delay the proceeding by asking for adjournments. Counsel argued that Rino Zanette consistently "thumbed his nose" at the Board and that the only appropriate response was a period of incarceration. Counsel suggested Rino Zanette remain in jail until he paid the damages owed to Local 607. The Board has carefully reviewed Rino Zanette's conduct during the course of the hearing and counsel's submissions. On October 27, 1986, Rino Zanette did refuse to answer certain relevant questions when directed to do so by the Board. The Board adjourned the hearing at that time in order to allow Rino Zanette

the opportunity to consult with counsel. Rino Zanette appeared with counsel on December 15, 1986 and answered all of the relevant questions put to him. In *Labour Relations Board for Saskatchewan v. Daschuk Lumber Ltd. et al*, [1976] 5 W.W.R. 562 (Sask. C.A.), the Court made the following comments at pages 565 and 566:

The general practice is that a person in contempt is usually relieved from the consequences of that contempt when he purges himself of the contempt by doing that which he neglected or wilfully refused to do.

Whether or not that general practice is made applicable in a particular case lies with the discretion of the judge disposing of the application. Here the learned chambers judge felt that he should follow this practice and I see no grounds upon which this court should interfere with the discretion he so exercised.

In exercising its discretion, the Board is satisfied that Rino Zanette purged himself of the contempt by answering all relevant questions put to him on December 15, 1986 and that, under the circumstances, he should be relieved from the consequences of that contempt. The Board is also satisfied that Rino Zanette's subsequent conduct did not constitute contempt. Accordingly, Local 607's motion on the contempt issue is denied.

39. Although not raised in final argument, Local 607 had requested at earlier stages an order from the Board directing certain respondents to pay Local 607's costs. For instance, when the October, 1986 hearing was adjourned as a result of Rino Zanette's failure to answer certain questions, Local 607 argued it was entitled to costs. The Board's general practice is to deny the successful party its costs. The reasons for this approach have been set out in a number of cases and need not be repeated here. See, for example, *Silknit Limited*, [1983] OLRB Rep. Nov. 1913 and *Gerald Lecuyer*, [1985] OLRB Rep. July 1099. The Board is satisfied that the circumstances before it do not warrant a departure from the Board's normal practice.

40. In a decision dated September 17, 1987, dealing with the first referral, the Board directed Rino Zanette (1981) Ltd. to pay forthwith the sum of \$44,884.10 to Local 607 as a result of its breach of the relevant collective agreement.

41. We turn now to the section 63 and subsection 1(4) application.

42. As indicated earlier, it was during the course of the hearing to determine the amount of damages owing to Local 607 by Rino Zanette (1981) Ltd. that Local 607 became aware of the fact that certain entities with connections to the Zanette family may have been involved in construction activity. This prompted Local 607 to request relief under section 63 and subsection 1(4) of the Act during the December 1986 hearing.

43. The Board heard extensive evidence relating to the business endeavours in which Rino Zanette and other members of his family have been engaged over the years. Sault Holdings is a land holding company. Rino Zanette (1981) Limited is a business run by Rino Zanette essentially as a masonry subcontractor. Zanette Investments is owned by Rino and Robert Zanette on an equal basis and is described by them as an investment company. 444348 is owned by Robert Zanette who describes this company as a real estate development company. Although not respondents, the Board also heard evidence concerning Terra Krete Limited ("Terra Krete"), Rino Zanette Limited and 464011 Ontario Ltd. c.o.b. as Best Building Products ("Best Building Products").

44. Sault Holdings was incorporated in 1972 with Rino Zanette and A. Durante as shareholders. Rino Zanette Limited, a masonry subcontractor, was involved in Sault Lookout in the

early 1970's on a high school project. Rino Zanette was encouraged to build one or two apartment buildings in Sault Lookout and it was for this purpose that Sault Holdings was incorporated. Sault Holdings acted as an owner for the apartment projects. It did not have any employees perform any construction work and sub-contracted out all of the work. Rino Zanette Limited did some of the masonry work. In 1977, all of the shares of Sault Holdings were transferred to Rino Zanette. In 1978, Sault Holdings amalgamated with two other entities to continue as one corporation under the name Sault Holdings. Rino Zanette and his wife are the directors of the amalgamated entity which continued as a holding company. Sault Holdings is the central feature of a family trust controlled by Rino Zanette and his wife. The beneficiaries of the family trust are all five Zanette children. Robert Zanette has no control of the trust.

45. Sault Holdings has owned land and buildings and leased them to other Zanette companies. From at least the early 1960's until approximately 1983, Sault Holdings owned property at 1200 Kam Road in Thunder Bay. For most of that period of time, it leased the property to Terra Krete, a company owned by Rino Zanette which manufactured and sold concrete products. When Terra Krete went out of business, Sault Holdings leased the property at 1200 Kam Road to Best Building Products. This latter entity manufactured and sold concrete products as well and was owned, in part, by Robert Zanette. When Best Building Products folded, the 1200 Kam Road property was sold by Sault Holdings to Canadian Pacific. Since Canadian Pacific did not purchase the building, Rino Zanette tore down the building and used parts of it in the construction activities of Rino Zanette (1981) Ltd. in 1985. With the sale of the Kam Road facility, the offices of Sault Holdings, 444348 and Rino Zanette (1981) Ltd. moved to a building on East Arthur Street in Thunder Bay, which was also a property owned by Sault Holdings. Since its creation, Zanette Investments also operated out of the East Arthur Street location. In February 1987, 444348 moved to a building at 428 Balmoral Street which is not owned by Sault Holdings. This move came at a time after Local 607 requested section 63 and subsection 1(4) relief against the respondents.

46. Zanette Investments was incorporated in March 1984. Robert Zanette became aware of an opportunity to develop the C.N.R. Hostel in Atikokan. He succeeded in obtaining the project and offered his father the opportunity to participate. Zanette Investments was created to own and manage the project. Robert and Rino Zanette each have a 50-50 interest in the company. A. J. Wing was the general contractor for the project which began in May 1984 and was completed in October 1984. Zanette Investments did not perform any construction work and did not employ any construction employees. Rino Zanette (1981) Ltd. got the contract to do the masonry work and it is unclear whether this contract flowed through A. J. Wing or was deleted from the contract with A. J. Wing. Rino Zanette was also at the project in his capacity as an owner and watched the job closely. The C.N.R. Hostel operates very much like a hotel. In managing the facility, Zanette Investments is required to staff it twenty-four hours a day and it employs people to perform functions similar to those of a desk clerk. Both Robert and Rino Zanette referred to Zanette Investments and the C.N.R. Hostel project as a "one-time deal". That company has not been involved in any other projects. Normally, on a project of this type, 444348 would develop and own the project, but Robert Zanette decided to handle the C.N.R. job differently since it was out of Thunder Bay.

47. Rino Zanette has been involved in the construction business since at least 1963 primarily as a masonry subcontractor. Rino Zanette Limited became defunct along with Terra Krete in 1979 when the bank called a loan. Rino Zanette (1981) Ltd. was incorporated in December 1981 and performed work as a masonry subcontractor. In a decision dated January 27, 1984 (Board File No. 1659-83-M), the Board found Rino Zanette Limited and Rino Zanette (1981) Ltd. to be one employer within the meaning of subsection 1(4) of the *Labour Relations Act*.

48. Rino Zanette (1981) Ltd. last performed work in late 1985. During 1985, it acted more

like a general contractor with respect to a few projects, namely, the jobs at Marostica Motors, Arnone Transport and Halfway Motors. Halfway Motors was the last project for Rino Zanette (1981) Ltd. It performed the masonry work and sublet the remaining work such as the electrical and plumbing. Rino Zanette testified that he acted as a general contractor on these three jobs in order to "feel it out" and that after the Halfway Motors job he had had enough. There is no evidence that 444348 was involved in the three jobs where Rino Zanette (1981) Ltd. acted as a general contractor.

49. Rino Zanette (1981) Ltd. did work as a subcontractor occasionally on projects owned by 444348. The combination apartment and commercial development at 1313 Brown Street was such a project. 444348 owns and manages the property. The construction work began in May 1985 and was completed in November 1985 with Rino Zanette (1981) Ltd. performing the masonry work which made up approximately ten to fifteen per cent of the project. On those projects for which Rino Zanette (1981) Ltd. acted as a subcontractor to 444348, the evidence does not suggest that the relationship between the two companies was other than a normal contractor-subcontractor relationship in the construction industry.

50. Rino Zanette (1981) Ltd. had a core group of employees who worked for the company prior to it ceasing operation. This core group consisted of M. Dolph, M. Pucci and O. Sonogo as labourers and G. Cicigoi as a bricklayer.

51. Local 607 filed its grievance against Rino Zanette (1981) Ltd. giving rise to the first referral on October 30, 1985. This grievance was referred to arbitration on November 11, 1985. It was shortly after this time that Rino Zanette (1981) Ltd. ceased operating. Local 607 argues that Rino Zanette (1981) Ltd. did not simply discontinue its business but rather sold it within the meaning of section 63 of the Act to 444348 in order to avoid its contractual obligations to Local 607.

52. For the most part, Robert Zanette obtained his background in the construction business from his association with his father. Robert lives with his parents and at the time he gave his evidence he was twenty-eight years old. He completed a couple of years of university in a business program but did not obtain a degree. Prior to its dissolution, Robert worked for Terra Krete as plant manager. He initially worked for the company on a part-time basis before becoming a full-time employee. While working as plant manager, he basically managed the manufacturing process and had very little to do with the on-site erection of precast. Local 607 was the bargaining agent of the manufacturing employees of Terra Krete and in May 1978, obtained bargaining rights for construction labourers employed by Terra Krete. After the bank loan was called, Terra Krete continued to operate for a couple of months in order to finish off some contracts. During this time, Robert worked in the office and eventually his employment was terminated. He then obtained employment as a salesman with a company selling office forms.

53. Robert Zanette incorporated 444348 in April 1980 when he was 20 years old and he testified that he immediately started looking for real estate deals. He testified that he is the one who makes the decisions for 444348, a company which can be characterized as an owner/developer. Robert described in considerable detail what is required to be done from the beginning of a project to its completion. He selects a site, purchases it, obtains the necessary blueprints, packages the project which is then presented to a wide selection of lenders in order to raise the required financing and subcontracts almost all of the work. In 1985, Robert obtained a licence to sell real estate and this assisted 444348 in finding real estate deals.

54. The first directors of 444348 were Robert and his brother George. From the time of incorporation to the present, Robert Zanette has been a director, an officer and a shareholder in the company. The by-laws of 444348 provide that there must be two directors. When George

Zanette resigned as a director in November 1980, Tom Turner became a director and remained one until January 1982. G. Copetti was a director from February 1982 until July 1982. Rino Zanette became a director in March 1983 and resigned his position in January 1985. Susan Zanette, Robert's sister, became a director after her father resigned. While they were directors of 444348, George Zanette and Tom Turner were also shareholders. When Tom Turner relinquished his shares, Keith Jobbit, counsel to 444348, held one share in trust and Robert testified that he believes the share is held in trust for himself. While a director, Rino Zanette was not a shareholder and according to the evidence of Robert and Rino, did not play an active role in the management of the company. Rino Zanette testified that he did not function as a director, did not attend any director's meetings and only let Robert use his name as a director as a favour.

55. When 444348 was initially formed, it had no assets. Its first major transaction involved the purchase of manufacturing equipment at an auction in late 1980 from Thorne Riddell acting as a receiver. These assets were previously owned by Terra Krete at the Kam Road location. Tom Turner arranged for the financing necessary to make the \$270,000 purchase of the equipment. The loans were secured by the equipment as well as personal guarantees from Robert Zanette and Tom Turner. 444348 did not operate a manufacturing enterprise. It leased the equipment to Best Building Products, whose principals were Robert Zanette and Tom Turner. This latter entity engaged in the manufacture and sale of concrete products and masonry materials beginning in early 1981 on the Kam Road site owned by Sault Holdings. Tom Turner arranged for the bank loan for Best Building Products in the amount of \$50,000 which was secured by inventory and receivables. Robert Zanette was the general manager of the manufacturing business. Tom Turner's involvement in Best Building Products ended in early 1982 and his interest in the company was transferred to Robert Zanette. Best Building Products sold material to Rino Zanette (1981) Limited in the ordinary course of business. There is no evidence which suggests that Rino Zanette had any involvement in the business of Best Building Products. Robert testified that while he was in charge of Best Building Products, the company tried to stay away from erecting precast and the evidence does not support a finding that Best Building Products engaged in construction work. Best Building Products ceased operation in the spring of 1983 when its loan was called. Since that time to the present, 444348 has been involved in selling off the manufacturing equipment.

56. In late 1981, while Best Building Products was operating its manufacturing business, Local 607 made an application under section 63 of the Act against a number of respondents including Terra Krete, Sault Holdings, Best Building Products and 444348. The Board consolidated the section 63 application with a termination application filed by Melvin Dolph. The Board determined that it was more expeditious to assume, without finding, that there had been a sale of a business and to deal firstly with the termination application. After determining that the petition filed in support of the termination application was signed voluntarily, the Board, by decision dated June 28, 1982, directed a representation vote of all employees of the respondents which included the employees of Terra Krete, Sault Holdings, Best Building Products and 444348 working in and out of the plant at 1200 Kam Road, Thunder Bay, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff. On the taking of the representation vote, more than fifty per cent of the ballots cast were cast in opposition to Local 607. Accordingly, the Board declared that Local 607 no longer represented the employees of Terra Krete, Sault Holdings, Best Buildings Products and 444348 for whom it had heretofore been the bargaining agent. Robert Zanette testified that the employees of the respondents in the termination application were no longer represented by a trade union subsequent to the Board's decision terminating bargaining rights.

57. Robert Zanette testified that after Best Building Products ceased operating, 444348 became more active in real estate development. In 1984, it bought a little house and fixed it up a

bit. In 1985, 444348 purchased an old house, tore it down and acted as owner/developer in the construction of a combination apartment and commercial development. This project is located at 1313 Brown Street and was referred to earlier in this decision. This development was completed in the fall of 1985 and is now managed by 444348. As noted earlier, 444348 was not involved in the other projects Rino Zanette (1981) Limited participated in in 1985.

58. In 1986, 444348 took over the development of a project which had been initiated by Rino Zanette (1981) Ltd. As a result of his involvement in the building of the new C.N.R. Hostel in Atikokan, Rino Zanette became aware of the fact that the C.N.R. wanted to demolish its old bunkhouse. Recognizing that the bunkhouse could be moved and used for development purposes, Rino Zanette (1981) Ltd. secured the demolition contract and engaged Commissioner Construction to move the bunkhouse in the fall of 1985. The old bunkhouse was cut into three sections and moved to another site. Rino Zanette (1981) Ltd. was unable to develop the project any further since it lacked the expertise and the reputation as a developer. After discussing the matter with his father, it was determined that Robert would take over the project. 444348, acting as owner/developer/manager, took over the project in 1986 and developed an eight-plex apartment. It bought the site and paid Rino Zanette (1981) Ltd. what its costs were for having the old bunkhouse moved. Rino Zanette (1981) Ltd. did not make a profit on the movement of the old bunkhouse. The construction of this project was completed in 1986. No masonry work was performed on this project. The evidence indicates that Rino Zanette played a role in supervising the project on an informal basis although he was not paid. Rino Zanette was able to do this since he was frequently in Atikokan attending to other business interests.

59. 444348 was involved in two other projects worth noting. It initiated a twenty-seven unit apartment building project on S. James Street in 1986 which was virtually completed by May 1987. By May 1987, a project at 700 Gordon Street was in the planning stages. Robert owned this site in his personal capacity and intends to build a multi-unit condominium project. Rino Zanette (1981) Ltd. was not involved in the S. James Street project and will not be involved in the 800 Gordon Street project.

60. The Board entertained a considerable amount of evidence concerning how each of the 444348 projects were financed. This evidence disclosed that neither Rino Zanette, nor any of the companies he is involved in, played a role in the financing of any of the 444348 projects. Quite frequently, 444348 obtained interim lending from Ann Maloney. Negotiations for the funds were handled by Vic Maloney, a partner in the law firm of Weiler, Maloney, Nelson. This is a firm which sometimes acted as counsel to Rino Zanette (1981) Ltd.

61. Since most of its work was subcontracted, 444348 Ontario Limited used labourers very sporadically until early 1986 when it got into some larger projects requiring more men. By the spring of 1987, the company had four regular employees. It had one handyman, a draftsman, an office secretary and a superintendent. Copetti was hired as superintendent in approximately June 1986 and part of his job consisted of coordinating the trades, estimating and job control. Copetti had been the plant superintendent at Terra Krete but prior to joining 444348, he worked as a manager of a banquet hall for five years. As noted earlier, M. Dolph, M. Pucci and O. Sonogo worked for Rino Zanette (1981) Ltd. as labourers and G. Cicigoi worked for that company as a bricklayer. After Rino Zanette (1981) Ltd. ceased operating, these individuals did perform work for 444348. Robert Zanette could not recall if Pucci worked on the eight-plex apartment job but thought that Dolph worked there sporadically. On this job, 444348 utilized at least six other persons to perform construction labourers' work. Dolph and Pucci worked on the S. James Street project. Robert Zanette testified that 444348 did pick up some employees who had worked for Rino Zanette (1981) Ltd. since they were good employees, although he could not recall how they were contacted. After

reviewing the payroll records for 444348, Local 607 alleged that these records disclosed that 444348 paid vacation pay to certain employees for a period of time when these employees worked for Rino Zanette (1981) Ltd. After reviewing the records and taking into account Robert Zanette's evidence on this point, the Board finds that this allegation is not supported by the evidence.

62. As noted earlier, 444348 shared office space with Rino Zanette (1981) Ltd. and the other respondents until February 1987. While sharing office space, the companies also shared a receptionist, used the same mailing address and on an informal basis, determined what share of various expenses would be paid by each company. All of the companies shared the same telephone number. In answering telephone calls, the receptionist would simply say "Zanette". This is consistent with the rental inquiry sign that had been placed in the window of the eight-plex apartment at 1313 Brown Street. It simply had "Zanette" in large type along with the shared phone number. 444348 maintained its own bank account. The payroll records of 444348 indicate that Robert Zanette's sister and mother worked in the office for a period of time in 1986.

63. Rino Zanette testified that Rino Zanette (1981) Ltd. was operated as a separate business from the other Zanette companies, including 444348, and that it ceased operating at the end of 1985. Robert Zanette testified that he alone controlled 444348 and that the business of this company was considerably different from the business of Rino Zanette (1981) Ltd. The latter company was essentially a small masonry subcontractor and acted as a general contractor on only three jobs before it ceased operating. Robert testified that as an owner/contractor, 444348 was quite different than a general contractor. A general contractor is tied to a contract with an owner at a certain price and essentially subcontracts the work at the lowest price. As an owner/builder, Robert testified that he is only responsible to himself. He can pay more to a subtrade in order to obtain quality work and is prepared to do this since the reputation of the company has a very important impact on its ability to sell its product. Robert conceded that in deciding who he should subcontract some of his work to, he may occasionally have discussions with his father who might suggest a name for consideration. However, Robert testified that the ultimate decision is his own. Robert indicated that the only involvement he had with Rino Zanette (1981) Ltd. was to occasionally help his father on the accounting aspect of the business by assisting him with the books. The evidence discloses that a crane with the name Terra Krete on it, owned by 444348, was used on Rino Zanette (1981) Ltd. jobs and that a John Deere forklift, whose ownership was not established in evidence, was used on both Rino Zanette (1981) Ltd. and 444348 jobs. A representative of Local 607 took pictures of Rino Zanette's car at the S. James Street project of 444348. Rino Zanette testified that he parked on the site on two or three occasions when visiting friends who lived nearby.

64. We propose to only summarize the extensive submissions made by counsel for Local 607. Counsel argued that Local 607 obtained bargaining rights for a number of the respondents pursuant to section 63 of the Act. For instance, counsel submitted that 444348 and Best Building Products were related employers and successors to Terra Krete. Counsel maintained that the Board's decision in 1982 terminating bargaining rights for 444348 and other respondents did not affect the construction industry bargaining rights of Local 607. In any event, counsel argued that Rino Zanette (1981) sold its business at the end of 1985 to 444348. As well, it was submitted that Rino Zanette (1981) Ltd. and the other respondents constitute one employer for the purposes of the *Labour Relations Act*.

65. The relevant parts of section 63 and subsection 1(4) are as follows:

63. (1) In this section,

(a) "business" includes a part or parts thereof;

- (b) “sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

66. In *The Tatham Company Limited*, [1980] OLRB Mar. 366, the Board reviewed the purpose of section 63 and the Board’s approach to its interpretation:

19. When a business (or part thereof) is transferred, or disposed of, the union retains bargaining rights for the employees in a “like unit” to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to the unit until the Board otherwise declares. The purpose of the section was succinctly summarized by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

“The purpose of section 47a [now section 63] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect ‘paper transactions’, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond ‘paper transactions’ to achieve that purpose. See, e.g. *Kem’s Masonry*, [1964] OLRB Rep. Dec. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.”

20. Section 55 [now section 63] prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of “vested interest” which becomes rooted in the business entity, and like a charge on property, “runs with the business.” To accomplish this objective, the statute gives a very special meaning to the word “sale”, envisages that bargaining rights can be continued in a severable “part” of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

21. In keeping with the broad language of the statute and its remedial thrust, the Board has

been disposed to give section 55 a liberal, rather than a narrow, interpretation. Little reliance is placed upon the legal form which the business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Of course, the nature of the commercial transaction by which the business may have been transferred cannot be ignored, but it is equally important to consider the intention of the Legislature in drafting section 55, whether the subject transaction creates the mischief to which the statute was directed, and whether the language of the statute can be reasonably said to apply.

22. A section 55 application really invokes two related questions: has there been a “sale” within the extended statutory definition of that term; and does what has been “sold”, “transferred” or “disposed of” constitute a “business” or “part of a business”. There is seldom any problem with respect to the first question. The real difficulty, as in the present case, is to decide whether what has been “transferred” or “sold” constitutes all, or part, of the predecessor’s “business”, or, whether there has merely been a transfer of assets or other “incidental” elements of the business. This is not to say that a sale of assets *only* cannot constitute the sale of business. As Mr. Scace in his book *The Income Tax Law of Canada* (3rd ed. L.S.U.C. 1976) points out in the chapter entitled “Buying and Selling a Business”:

“Although businesses may be consolidated in a number of different ways e.g. by an amalgamation or a winding up, there are only two methods by which a business can be bought or sold, namely, the purchase or sale, of assets or shares.”

A commercial lawyer could hardly consider it a novel proposition if one suggested that a “sale of a business” could be accomplished by an asset transaction. We cannot accept the submission that since only assets were transferred, *ipso facto*, there cannot be a transfer of part of the business. The issue before the Board is whether this particular asset transaction can be considered a “sale” of “part of a business” within the meaning of section 55 of *The Labour Relations Act*. This requires an appreciation of the labour relations context, as well as some consideration of what a business is, and how one might determine whether it is “the business” which has been transferred.

23. A business is a combination of physical assets and human initiative. It is an economic organization which, in a sense, is more than the sum of its parts. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211, the Board put it this way:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is ‘the totality of the undertaking’. The *physical assets of buildings, tools and equipment in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations to fulfil the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitutes a business.*” [Emphasis added]

A business is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market - profitably, in the case of private sector enterprises but, in any event, efficiently. It is one harmonious whole consisting of many interrelated parts. From a labour relations perspective, however, the employer-employee relationships take on a special significance. From this view point, the importance of the business is that it generates work for employees. The entrepreneurial activities of the business require it to enter the labour market as an employer and, this in turn, may give rise to the collective bargaining relationships to which *The Labour Relations Act* is directed. Section 55 preserves the stability of those established collective bargaining relationships if the business, or a coherent part of it, are transferred to a new owner.

24. As might be expected in a labour relations statute, the Board pays particular attention to the character of the business and the characteristics of the employer-employee relationship. In determining whether there has been a “sale” within the meaning of section 55, the Board attaches a special significance to the nature of the work performed in, and by, the business,

before and after the alleged transfer. If the nature of the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, this would support an inference that there has been a transfer of a business within the meaning of section 55. This approach was considered by the British Columbia Supreme Court in *R. v. B. C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969) 3 D.L.R. (3d) 41 - an application for *certiorari* in respect of the then existing successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J., observed:

"One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.*" [Emphasis added]

Unless there is a continuation of the work and jobs it would make little sense to preserve the collective bargaining relationship or the collective agreement - particularly in a case like the present one, where the trade union itself is organized on the basis of certain established craft skills.

25. In determining whether there has been a sale of the predecessor's business, the Board has also found it useful to consider the extent to which the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner. This was the approach taken by the Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed 18 Jan. 1979) where the Board listed some of the factors which might be significant in deciding if there had been a transfer of the predecessor's business:

"In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before..."

This was also the approach adopted by Widjery, J. in *Kenmir v. Frizzel, et al.*, [1968] 1 A11 E.R. 414 - a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

"In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the*

effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before. [Emphasis added]

If most of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a "sale of a business" to which section 55 applies.

26. All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a "mere sale of assets" and a sale of "part of a business." As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

"This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided."

The issue of whether successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

67. In assessing the facts in the context of a section 63 application as well as a subsection 1(4) application, the Board takes particular cognizance of a pre-existing relationship. The following passage in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, explains the basis for this approach:

35. In assessing the facts from which a transfer of a business may be inferred, the Board has always been especially sensitive to any pre-existing corporate, commercial or familial relationship between the predecessor and the alleged successor; or between the predecessor, the alleged successor and a third party. Transactions in these circumstances require a more careful examination of the business realities than do transfers between two previously unrelated business entities. The presence of a pre-existing relationship may suggest an artificial transaction designed to

avoid bargaining obligations; or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55 [now section 63], disturb the collectively bargained framework for that relationship. A business may have created a new legal vehicle to carry on all or part of its activities, or it may have redistributed those activities among its existing legal components without changing its essential character or the identity of its real principals or proprietors. The separate legal identity of the components may be superfluous from an economic view point, and there may be an *actual* transfer of business activity from one to the other, even though there is little evidence of a transfer of tangible assets, goodwill, etc. In reality, the employer's business may not be exclusively "his" to transfer, for a common principal, shareholder or corporate parent may have the effective power to extinguish an apparently independent business and transfer its economic functions to another. If both businesses are also "in the same business", (i.e. supply the same product in approximately the same way and potentially to the same market or customers) a transfer of a business may have occurred but may be very difficult to detect. In such circumstances it may be important to carefully examine the pre-existing links or lines of common control to which the alleged predecessor and successor are both subject. Such examination is precisely what is undertaken by the Board on an application under section 1(4); but it is also relevant on section 55 applications, and it is for this reason that applicants commonly plead section 1(4) in the alternative. It would be incorrect to make this consideration a decisive "test" for successorship; but where there is a pre-existing corporate connection between the predecessor and the successor the Board has been disposed to infer a "transfer" if there is the slightest evidence of such transaction. (See: *Zehrs Markets*, [1975] OLRB Rep. Jan. 48.) The pre-existing "nexus" between the respondents inevitably colours the Board's view of facts. As a practical matter, it is much more difficult to sustain the contention that one has not acquired a predecessor's business but merely founded a new, independent, but similar, business serving the same market. (See, for example: *Thorco*, *supra*, where a firm closed down one of its manufacturing operations and transferred its equipment to a recently incorporated related company; or *Gordons Markets*, *infra*, paragraph 40. In both cases the transaction also looked like a scheme to avoid bargaining rights.)

68. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board described the purpose of subsection 1(4) and went on to explain why in some circumstances an order under subsection 1(4) is more appropriate than an order under section 63:

12. ...

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55. This is especially the case in the construction industry

where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

69. The Board is not satisfied that the evidence supports the applicant's argument that Local 607 obtained bargaining rights for some of the respondents as a result of a sale of the construction business of Terra Krete. Although Terra Krete occasionally engaged in the erection of precast and was certified by Local 607 for construction labourers, the evidence does not support the conclusion that, in addition to the manufacturing business which was transferred, there was a transfer to Best Building Products of the construction business of Terra Krete. In any event, it appears that any bargaining rights held by Local 607 as a result of any possible sale involving 444348, Best Building Products and Sault Holdings were terminated by the Board in 1982. It was argued that the Board's decision terminating the bargaining rights of Local 607 applied only to Terra Krete's manufacturing business and that this is supported by the fact that the bargaining unit was described as an all employee unit. The description in the decision does refer to "all employees" but is not consistently framed in industrial terms. The exclusions begin with "non-working foremen" which is language commonly used in a construction bargaining unit. The bargaining unit description used by the Board in its termination decision would have been taken from the parties' collective agreement which was not placed before us. The parties may have defined their bargaining unit without regard to the rules the Board would normally utilize in a certification proceeding. The Board's decision in 1982 terminates the bargaining rights Local 607 had with all of the named respondents. Robert Zanette testified that after the Board's decision, Local 607 had no involvement with the operation of any of the respondents named in the termination application. Having regard to all of the circumstances, the Board finds that Local 607 did not continue to hold bargaining rights subsequent to the Board's termination decision in 1982 for the employees of any of the respondents named in that proceeding. The applicant is left then with demonstrating that it has or should have bargaining rights with the respondents flowing from its bargaining rights with Rino Zanette (1981) Ltd.

70. The applicant argued that the Board should declare Sault Holdings and Zanette Investments, along with certain other named respondents, to be a single employer for the purposes of the Act. However, as indicated above, Zanette Investments was a "one-shot deal" and never employed any construction employees, let alone construction labourers. For at least the last ten years, Sault Holdings has operated as a land holding company which has not employed anyone to perform construction industry work. Even when it acted as an owner/developer, there is no evidence to suggest that Sault Holdings employed any construction employees. In these circum-

stances, even if all of the other elements necessary for a subsection 1(4) declaration were found to be present, the Board would not exercise its discretion to give subsection 1(4) relief regarding Sault Holdings and Zanette Investments. As noted in the cases referred to above, subsection 1(4) and section 63 are designed to protect a trade union's bargaining rights when the business to which those bargaining rights attach is sold or is carried out by or through more than one legal entity. However, bargaining rights do not arise in an employment vacuum and the operation of these provisions has generally been limited to protecting bargaining rights that attach to enterprises giving rise to employment. In exercising its discretion under subsection 1(4), one of the factors which the Board examines is whether the business carried on by a respondent employs anyone. If a respondent does not have any employees and does not have a history of employing anyone, it will generally be very difficult for an applicant to demonstrate that a subsection 1(4) declaration is warranted. In this case, the Board has not been convinced that it should exercise its discretion under subsection 1(4) of the Act insofar as Sault Holdings and Zanette Investments are concerned, given the absence of construction labourers in their employ. Should this situation change, it would be open to Local 607 to seek relief under subsection 1(4).

71. We are left then with the issues of whether the business of Rino Zanette (1981) Ltd. was sold to 444348 within the meaning of section 63 of the Act or whether these two entities are a single employer within the meaning of subsection 1(4) of the Act.

72. As the Board noted in *Brant Erecting and Hoisting, supra*, the nature of the business of a small construction company is such that it is often very difficult to detect the transfer of the business from one entity to another since, in reality, there is very little, if anything, in a concrete sense to transfer. It is for this reason that the Board has noted that it is often more appropriate to deal with situations of this type within the context of subsection 1(4) of the Act. In reviewing all of the evidence before us, the Board is unable to conclude that there has been a sale of a business from Rino Zanette (1981) Ltd. to 444348. The evidence adduced before us does not establish that there has been a continuation of all or part of the business of Rino Zanette (1981) Ltd. by 444348. Many factors, such as the transfer of goodwill, existing contracts and accounts receivable, which are often of some assistance in determining whether there is a continuation of the business, are not present here. Although there is some evidence that the two companies shared two pieces of equipment, there is no evidence that any equipment was transferred from Rino Zanette (1981) Ltd. to 444348 when Rino Zanette (1981) Ltd. ceased operating. The only two factors which might lead one to conclude that there has been a sale of a business in this case is the movement of most of the employees of Rino Zanette (1981) Ltd. from that company to 444348 in approximately mid-November 1985, and the fact that those employees performed similar work utilizing the same skills when working for 444348. However, these factors by themselves are not determinative as illustrated by the following comments in *Metropolitan Parking Inc., supra*, at paragraph 36:

36. Despite the labour relations focus of the statute "the business" is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJC Ltd. et al.*, (1978) 1 Can. LRBR 565:

"The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons for-

merly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it...

But continuity of the work done is not sufficient alone to satisfy section 1(4). There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a sucesorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [Emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

“There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

The focus of section 55 is the business entity - the employer's total economic organization - not simply the work which the employees perform.

Although the work in part performed by 444348 with some of the employees formerly employed by Rino Zanette (1981) Ltd. is similar to the work performed by Rino Zanette (1981) Ltd., we are unable to conclude, in all the circumstances, that the business or part of the business of Rino Zanette (1981) Ltd. was sold to 444348 within the meaning of section 63 of the Act. In assessing the facts, the Board has been mindful of the pre-existing familial relationship. As the Board notes in *Metropolitan Parking, supra*, the existence of a previous relationship is not “a decisive ‘test’ for successorship” but causes the Board to very carefully examine the facts relied upon to support a sale of a business allegation.

73. For the foregoing reasons, the applicant is not entitled to relief under section 63 of the Act. We turn next to the applicability of subsection 1(4). Before the Board can exercise its discretion under that provision to declare that the entities in question constitute one employer for the purposes of the Act, three conditions must be satisfied. There must be more than one corporation, firm or individual association or syndicate involved. The entities must be under common control or direction. And finally, the entities must be engaged in associated or related business activities. Subsection 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously.

74. This case clearly involves more than one corporation. In determining whether or not Rino Zanette (1981) Ltd. and 444348 are under common control and direction, the focus must be on Rino Zanette. The central feature of Rino Zanette (1981) Ltd. is Rino Zanette. There is no evidence to suggest that Robert Zanette played any role in Rino Zanette (1981) Ltd. prior to it ceasing operation. In argument, Local 607 submitted that the evidence warranted a finding that the two

companies were a single employer from that point in time in 1985 when both were involved in the project at 1313 Brown Street. In effect, Local 607 maintains that from that time on, Rino Zanette's involvement with 444348 should lead the Board to conclude that the two companies are under common control and direction.

75. The Board has indicated that the following criteria are of some assistance in determining whether associated or related activities or businesses are carried on under common control or direction: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. See, for example, *Donald A. Folly*, [1980] OLRB Rep. Apr. 436 and *Walters Lithographic Company Limited*, [1971] OLRB Rep. July 406. With these criteria in mind, the Board has examined the role of Rino Zanette in 444348.

76. Rino Zanette does not have an ownership interest in nor does he exercise any financial control of 444348. For a period of time ending in January 1985, Rino was a director of 444348 but did not attend any meetings or exercise any authority as a director. Rino Zanette's term as a director came to an end prior to the start of the construction activity on the 1313 Brown Street project.

77. The evidence concerning common management favours the two respondents, although not conclusively. Robert Zanette made the decisions affecting the operation of his company and, since April 1986, Coppetti also played a significant managerial role. Rino Zanette (1981) Ltd. was the masonry subcontractor for the project at 1313 Brown Street but the evidence does not suggest that Rino Zanette performed a role on that project which was not typical of a subcontractor. In other words, the evidence does not indicate that Rino Zanette was in charge of the job. The same cannot however be said regarding his role in the construction in 1986 of the eight-plex apartment in Atikokan. Although not paid for his work, Rino Zanette played a role in supervising the project. Although the evidence does not disclose the precise nature and extent of his supervisory duties, his participation in this project provides some support for Local 607's position. However, the evidence does not suggest Rino Zanette played a similar role in any of the other 444348 projects. The mere presence of his car on the S. James Street project does not establish that he played a significant role with respect to that project.

78. There is a degree of interrelationship of operations of the two companies. For a considerable number of years, they have operated out of the same premises, have a common reception area, phone number, bookkeeper and post office box, and informally shared office expenses. It is noteworthy that these arrangements have existed for many years prior to the time Local 607 alleges that the two companies became one employer for the purposes of the Act. Their continued presence in 1985 and subsequently is of less significance than they might otherwise be. We note as well that it is not surprising that companies with a family connection would share space and office expenses. Although a relevant factor, the sharing of space and office expenses must be viewed in the broader context of the business operations of the two companies. The fact that businesses share office space and expenses alone will not make them one employer for the purposes of the Act.

79. There is some evidence that the companies have been held out to the public as a single integrated enterprise. The rental sign at 1313 Brown Street with the common phone number as well as answering the common phone with the word "Zanette" suggest some commonality. These factors though are very much related to the sharing of office space. Regarding centralized control of labour relations, there is no evidence to suggest that anyone other than Robert Zanette, and perhaps Coppetti, determines who will be hired to work for 444348 Ontario Limited, what work they will perform, where they will work and what the terms and conditions of their employment will be.

80. Local 607 emphasized the age of Robert Zanette and the considerable construction experience of Rino Zanette in submitting that Rino Zanette must be playing a significant role in 444348. However, the Board found Robert Zanette to be a credible witness and a person who is extremely knowledgeable in the business of developing properties, as evidenced by his detailed testimony concerning the various aspects of developing a property beginning with the site selection and proceeding with the financing and the ultimate construction of a building. Having regard to all of the evidence, we find that Robert Zanette operated 444348 without any significant control or direction from his father.

81. The essence of a subsection 1(4) situation is the presence of a common principal or principals benefiting from a related activity or business. When reviewing the relevant criteria and the circumstances in this case, the Board cannot conclude that Rino Zanette is in effect one of the principals of 444348 or that he benefits from that company's operations. Although we can understand how some of the circumstances would have caused Local 607 to suspect that the companies were related, this matter cannot be determined on the basis of suspicion. The Board is not satisfied on the evidence before it that Rino Zanette (1981) Ltd. and 444348 are under common control or direction. Given this finding, it is unnecessary for us to determine whether these two entities are engaged in associated or related activities or businesses and, if so, whether it would be appropriate to exercise our discretion to grant relief under subsection 1(4).

82. Accordingly, Local 607's section 63 and subsection 1(4) application is dismissed.

83. As noted earlier, the Board ruled in May 1987 that it would not begin to hear the evidence relating to the second referral at that time. In paragraph 37 of this decision, the Board has indicated why it would not, as suggested by counsel for Local 607, apply the evidence it heard on the section 63 and subsection 1(4) application to the second referral. Local 607 could only succeed with the second referral if it succeeded with its section 63 and subsection 1(4) application. Since Local 607 has not succeeded with that application, it is appropriate to dismiss the second referral. Accordingly, the referral of a grievance to arbitration in Board File No. 0343-87-G is hereby dismissed.

DECISION OF BOARD MEMBER HENRY KOBRYN; September 21, 1988

1. I have read this seventy-three page decision most carefully. I can agree with all that has been written on the history of these proceedings. The only disagreement I have with the decision is the reasoning as to why the subsection 1(4) application by the union should be dismissed.

2. This history is an accurate account of the extensive manipulations by the respondents, who are a closely-knit family group overseen by its patriarch, Mr. Rino Zanette, to frustrate and delay these proceedings. The respondents' counsel were used for the same purpose, knowingly or otherwise, and then discharged by the respondents.

3. These tactics become clear when one reads the lengthy letters written by counsel for Mr. Robert Zanette arguing that Zanette Investments Inc. and 444348 Ontario Limited should not be named as parties in these proceedings because they did not get notice and were not aware of these proceedings. Yet Mr. Robert Zanette lived at home during this period and he told us that he assisted his father with the bookkeeping for the companies.

4. This is also an accurate history of the various companies set up by Mr. Rino Zanette starting with Rino Zanette Limited, Sault Holdings Limited, Terra Krete Limited, 464011 Ontario Limited c.o.b. as Best Building Products, Rino Zanette (1981) Ltd., Zanette Investments Inc. and 444348 Ontario Limited.

5. Zanette Investments Inc. has Rino and Robert as part-owners. 444348 Ontario Limited has Robert as the owner and, for a time had Rino as a director and a supervisor of a construction project.

6. Rino Zanette Limited was replaced by Rino Zanette (1981) Ltd. in 1981. Then the union got a subsection 1(4) decision on January 27, 1984 (Board File No. 1659-83-M) which was resisted, and then the union filed a grievance which was referred to arbitration on November 11, 1985. It was shortly after this time that Rino Zanette (1981) Ltd. ceased operating.

7. This is a classic case for a successful subsection 1(4) declaration for the following reasons:

- (1) This is a closely-knit family group overseen by its patriarch Mr. Rino Zanette.
- (2) Mr. Robert Zanette, owner of 444348 Ontario Limited, resides in the family home with his father (paragraph 8 of decision).
- (3) Rino Zanette and Robert Zanette were the owners of Zanette Investments Inc. (paragraph 43 of decision).
- (4) All the corporate entities in these proceedings had the same address (paragraph 45 of decision).
- (5) 444348 Ontario Limited only moved out from that address after the union made a section 63 and subsection 1(4) application.
- (6) Rino Zanette has a long history of involvement in the construction industry as a masonry subcontractor and later as a general contractor. He is the one with the extensive building construction experience (paragraphs 47 & 48 of decision).
- (7) Robert Zanette's work experience has very little to do with building construction experience. He was plant manager at Terra Krete, then got into real estate re the development of properties and their financing (paragraphs 52 & 53 of decision).
- (8) 444348 Ontario Limited was incorporated in April 1980 to purchase the manufacturing equipment previously owned by Terra Krete from a receiver (paragraph 55 of decision).
- (9) Rino Zanette was a named director of 444348 Ontario Limited for a time (paragraph 54 of decision).
- (10) 444348 Ontario Limited took over the former employees of Rino Zanette (1981) Ltd. (paragraph 61 of decision).
- (11) 444348 Ontario Limited shared the crane and other equipment with Rino Zanette (1981) Ltd. (paragraph 63 of decision).
- (12) At the CNR job at Atikokan, Rino supervised the job for Robert Zanette (paragraph 77 of decision).

- (13) There was an interrelationship between the operations of the two companies for a considerable number of years (paragraph 78 of decision).
- (14) There was also evidence that the companies have been held out to the public as a single integrated enterprise (paragraph 79 of decision).

8. For a person who has at least thirty-five years of experience in construction industry labour relations throughout this whole province and a substantial amount of experience as a participant in proceedings in subsection 1(4) cases, all the reasons listed above spells out to me that this is a case with all the required elements for a successful subsection 1(4) case. In addition, the credibility of the patriarch of this closely-knit family group is basically non-existent; he would only answer the necessary questions asked of him after he was faced with contempt of the Board.

9. The history of these proceedings begs the question: if the respondents had nothing to hide, why did they resort to the shenanigans outlined in this history, in an open attempt to bamboozle the union and this Board?

10. For all the above reasons, I feel the subsection 1(4) should succeed and the Board declare Rino Zanette (1981) Ltd., Sault Holdings Limited, Zanette Investments Limited and 444348 Ontario Limited to be one employer within the meaning of subsection 1(4) of the *Labour Relations Act*.

3202-86-M; 0723-88-G Labourers International Union of North America, Local 1081, Applicant v. **Rockwall Concrete Forming (London) Limited**, Respondent

Collective Agreement - Construction Industry - Construction Industry Grievance - Voluntary Recognition - Union and Employer entering into voluntary recognition agreement for employees engaged in concrete forming in all sectors in one Board area - Parties subsequently entering into collective agreements also limited geographically to formwork - Union local in another Board area alleging that employer was required to apply provincial ICI agreement - Employer arguing that concrete formwork was a recognized exception to the ICI scheme - Whether local formwork agreement inconsistent with statute - Whether it nevertheless creates ICI bargaining rights province-wide - Local formwork agreement declared null and void as it applies to the ICI sector - Voluntary recognition agreement, if it survives subsequent collective agreements, found to be ineffective insofar as the ICI sector is concerned - Grievances dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members M. Rozenberg and E. G. Theobald.

APPEARANCES: S. B. D. Wahl for the applicant; W. Thornton for the respondent; L. C. Arnold for Labourers' Local 1059.

DECISION OF THE BOARD; September 26, 1988

I

1. These are two applications under section 124 of the *Labour Relations Act* which were scheduled for hearing together. In each case, the applicant, "Local 1081", contends that the respondent "Rockwall" has failed to comply with the terms of a collective agreement by which it is bound. Local 1081 contends that Rockwall is obliged to apply the Labourers' provincial ICI agreement to certain construction projects in Cambridge, Ontario.

2. Rockwall replies that it is not bound by the ICI provincial agreement either in its "home base" of London, Ontario, or anywhere else in the province. Rockwall maintains that it has no bargaining relationship with Local 1081. Its only collective agreement is a so-called multi-sector "formwork agreement" with Labourers' Local 1059, and that applies only to the London area (i.e., Board Area #3). In Rockwall's submission, outside Board Area 3 or when engaged in other than formwork, all of its construction activities are "non-union".

II

3. The hearing in this matter was completed on July 18, 1988. The parties agreed that the Board should first address the "threshold issue" of whether Local 1081 had bargaining rights, and whether the provincial ICI agreement might apply to a construction project in Cambridge. It was conceded that if Local 1081 did not have bargaining rights, or the provincial ICI agreement could not apply, there would be no contractual foundation for the present application. The parties further agreed to leave to a later date the characterization of the projects in question and, in particular, whether one or more of them should be regarded as "residential" rather than "ICI" construction.

III

4. Following the completion of the evidence, James McKinnon, an officer of Labourers' Local 1059, advised the Board that he wished to retain counsel and make submissions. Local 1059 had been represented by counsel early on in these proceedings and has continued to receive notice throughout; however, by letter dated March 16, 1987, the then solicitor for Local 1059 indicated that he was no longer acting on its behalf. Thereafter, Local 1059 was not represented, nor did it seek status as an intervener. It was not until the case was completed and the active parties moved to argument that Local 1059 requested the opportunity to address the legal issues raised in this case.

5. Rockwall had no objection to hearing representations from Local 1059. Nor did Local 1081. The Board therefore received those submissions. We make no finding with respect to Local 1059's *right* to intervene.

IV

6. The facts are not substantially in dispute.

7. In July 1984, Local 1059 sought certification as bargaining agent for the employees of Alwell Forming London Limited and Colony Investments London Limited. It is agreed that those entities are predecessors of what is now Rockwall, or, alternatively, that all three companies are one employer within the meaning of section 1(4) of the Act. At the time of the certification application they were engaged in both ICI and non-ICI construction activities.

8. The certification application was brought pursuant to section 144(1) of the *Labour Rela-*

tions Act. The union sought bargaining rights for two bargaining units: one encompassing all construction labourers in the employ of the companies in the ICI sector of the construction industry, and a second broader unit encompassing all construction labourers, carpenters, cement finishers, truck drivers, equipment operators and rodmen employed in all other sectors of the construction industry in Board Areas 1, 2, 3, 4, 5, 6, 21, 22 and 26. The employer challenged the union's proposed bargaining unit descriptions and suggested two other units which, it was said, were more consistent with the Board's practice.

9. The details of that dispute need not be canvassed here. It suffices to say that the employer acknowledged that, at the time the application was made, there were ongoing construction activities in both the ICI and other sectors of the construction industry, and that, pursuant to section 144, the appropriate bargaining units would encompass all construction labourers in the ICI sector, province-wide, and all construction labourers (and perhaps others) working in other sectors in one or more geographic areas in Ontario. Certification would establish both ICI and non-ICI bargaining rights, and in respect of the ICI sector, upon certification, as a matter of law, the employer would automatically "plug in" to the ICI provincial agreement.

10. Local 1059's certification application did not proceed to a hearing. James McKinnon, an official of Local 1059, met with the principal of Alwell/Colony (now Rockwall) while the certification was pending, in order to explore the possibility of a settlement. Mr. McKinnon testified that the company's business is confined exclusively to concrete forming - for the most part in the residential sector, but also in the ICI sector from time to time - and as noted, the result of a successful certification application would have been to bind the employer to the provincial ICI agreement for all of its ICI construction activities. The employer did not welcome that result, so Mr. McKinnon suggested an alternative. He told the employer that it could sign a London area *local* "forming agreement" which would apply to all of its concrete forming work in whatever sector such work might be done, but would neither extend beyond London nor bind the employer to the ICI agreement in London or elsewhere. The employer willingly embraced that alternative.

11. On October 22, 1984 the union and Alwell/Colony (now Rockwall) entered into the following voluntary recognition agreement:

1. The Employer hereby acknowledges that the Union is entitled to and does represent all its construction employees engaged on concrete forming construction in the Ontario Labour Relations Board Area #3 (Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron) save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff.
2. The Employer hereby recognizes the Union as the exclusive bargaining agent for all its employees engaged on concrete forming construction in Ontario Labour Relations Board Area #3 (Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron) save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff.

The certification application, and a related unfair labour practice complaint were both withdrawn.

12. Following the execution of that voluntary recognition agreement, the parties engaged in collective bargaining and entered into a 1985-86 "formwork agreement" of the kind proposed by Mr. McKinnon. It contains the following clauses:

GENERAL PURPOSE

The general purpose of this Agreement is to establish mutually satisfactory relations between the Employer and its employees, to provide a means for the prompt and equitable disposition of

grievances, and to establish and maintain satisfactory working conditions, hours of work and wages for *all employees who are subject to its provisions engaged in Concrete Forming and Finishing construction.*

ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the sole collective bargaining agency *for all its construction employees engaged on all construction projects* within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical staff and engineering staff.

Subsequent collective agreements were framed this way:

1986-87

GENERAL PURPOSE

The general purpose of this Agreement is to establish mutually satisfactory relations between the Employer and its employees, to provide a means for the prompt and equitable disposition of grievances, and to establish and maintain satisfactory working conditions, hours of work and wages for *all employees who are subject to its provisions engaged in concrete forming and finishing construction.*

ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the sole collective bargaining agency *for all its construction employees engaged on all construction projects* within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff.

1987-88

GENERAL PURPOSE

The general purpose of this Agreement is to establish mutually satisfactory relations between the Employer and its employees engaged in concrete forming and finishing construction, to provide a means for the prompt and equitable disposition of grievances, and to establish and maintain satisfactory working conditions, hours of work and wages for *all employees who are subject to its provisions engaged in concrete forming and finishing construction.*

ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the sole collective bargaining agency *for all its construction employees engaged in concrete forming and finishing construction* on all construction projects within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff.

1988-89

GENERAL PURPOSE

The general purpose of this Agreement is to establish mutually satisfactory relations between the Employer and its employees engaged in concrete forming and finishing construction, to provide a means for the prompt and equitable disposition of grievances, and to establish and main-

tain satisfactory working conditions, hours of work and wages for *all employees who are subject to its provisions engaged in concrete forming and finishing construction.*

ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the sole collective bargaining agency for all its construction employees engaged in concrete forming and finishing construction on *all residential construction* projects within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth, and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff.

[emphasis added]

When the general purpose and recognition clauses are read together, it is apparent that until 1988-89, the arrangement with Rockwall was along the lines that Mr. McKinnon had proposed: an agreement confined to formwork and limited geographically to Board Area 3, but unrestricted with respect to the sector in which the formwork was done. On its face the agreement would apply to formwork in the ICI sector.

13. It should also be noted that until the current (1988-89) agreement, Article 1 of the various Rockwall "forming agreements" obliged Rockwall to apply the relevant local roads agreement, sewer and watermain agreement, and utilities agreement if it did work in those sectors. It is clear therefore that, by reference at least, the agreements with Rockwall were intended to be multi-sector agreements. It was not until after the filing of these grievances that Rockwall and Local 1059 sought to restrict the scope of the agreement to residential construction.

14. Prior to the present grievances, the above-mentioned local "form work" collective agreements were in fact applied to the company's work in all sectors in the London area, *including ICI projects*. The company did not apply the provincial ICI agreement and Local 1059 made no complaint. The problem arose only when the company became engaged in a project in Cambridge, within the geographic jurisdiction of Local 1081. Rockwall insisted on using a crew of members from Local 1059, and denied any obligation to apply the ICI agreement to the work in question. Local 1081 contended that Rockwall was required to use *its* members, and apply the terms of the provincial ICI collective agreement.

V

15. Before turning to the particulars of this case, it may be useful to briefly describe the statutory framework within which the parties' rights must be determined. The provisions of the *Labour Relations Act* to which reference will be made are as follows:

137.-(1) In this section and in sections 135 and 138 to 151,

- (a) "affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.

...

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the

employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

139.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to *different* provincial, national or international trade unions *bargain as a council* of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of

the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

We should also set out the way in which the Minister has framed the Labourers' employee bargaining agency designation:

EMPLOYEE BARGAINING AGENCY DESIGNATION

The designation of The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council dated April 21, 1978, amended July 13, 1978 and December 6, 1978, is further amended by excluding from this designation the bargaining relationship between the Metropolitan Toronto House Wreckers Association and The Labourers' International Union of North America, and The Labourers International Union of North America, Ontario Provincial District Council so that the designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 139 of The Labour Relations Act, R.S.O. 1970, c. 228, as amended, I hereby designate The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council as the employee bargaining agency to represent in bargaining all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, represented by the following affiliated bargaining agents:

1. The Labourers' International Union of North America; or
2. The Labourers' International Union of North America, Ontario Provincial District Council; or
3. The following Local Unions: 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089; or
4. Any other Local of The Labourers' International Union of North America which, in the future, may be chartered to represent construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices, and employees engaged in cement finishing, waterproofing or restoration work;

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;

- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

For purposes of clarity, it should be noted that notwithstanding the fact that locals set out in paragraph 3 above are affiliated bargaining agents within the meaning of clause a of section 137, *certain of them have or may acquire bargaining rights, or are, or may become bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming construction, namely the agreement between Locals 183 and 1081, and the Ontario Form Work Association and between Local 493 and Romm Construction Company Limited, whereby they represent employees who do not commonly bargain separately and apart from other employees. Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association and Romm Construction Company Limited, and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction, such locals are not affiliated bargaining agents within the meaning of clause a of section 137, nor are they included in or covered by this designation under subsection 1 of section 139, nor are they or the said collective agreements and bargaining thereunder affected by section 133 of The Labour Relations Act.*

Pursuant to subsection 2 of section 139 of The Labour Relations Act, I hereby exclude from this designation the bargaining relationship between the Formwork Council of Ontario and the Ontario Form Work Association.

Pursuant to subsection 2 of section 139 of The Labour Relations Act, I hereby exclude from this designation the bargaining relationship between the Metropolitan Toronto House Wreckers Association and The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

September 30, 1983

[emphasis added]

16. For ease of exposition, we will occasionally use the term "local union" in place of the statutory term "affiliated bargaining agent".

VI

17. Prior to 1978, collective bargaining in the construction industry was largely a patchwork quilt of local collective agreements between individual employers or employer associations and geographically-based local trade unions. There was some consolidation and extended area bargaining as a result of accreditation, the formation of employer associations or the creation of councils of trade unions, but, by and large, the picture was one of considerable fragmentation. In 1977, an industrial enquiry commission probing the industrial relations problems of the construction industry, proposed a radical change in bargaining structure: province-wide bargaining by trade. It was suggested that extended area bargaining on this model would moderate some of the instability which had plagued construction industry collective bargaining in previous years. The Legislature accepted those proposals.

18. Between 1978 and 1980 the Legislature substantially amended the construction industry provisions of the *Labour Relations Act* to introduce province-wide bargaining, by trade, in the industrial, commercial and institutional sectors (ICI) of the construction industry, through *designated* employer and employee bargaining agencies (essentially designated provincial employer associations and designated province-wide councils of unions). The designations were made by the Minister of Labour, in consultation with the parties involved, pursuant to section 139 of the Act. In each trade, ICI bargaining must now take place on a provincial basis for two-year collective agreements with common expiry dates. Local ICI bargaining is no longer permitted (see section 146)

and any local agreement or arrangement pertaining to the ICI sector is deemed to be null and void.

19. This shift in the locus of collective bargaining was accompanied by changes in the way in which local unions (affiliated bargaining agents) acquire and hold bargaining rights. Pursuant to section 144 of the Act, an application for certification which relates to the ICI sector must now be brought by a local union not only on its own behalf, but also on behalf of all of its sister locals throughout Ontario, and must encompass all employees who would be bound by a provincial collective agreement. Similarly, a voluntary recognition agreement, insofar as it relates to the ICI sector of the construction industry, not only binds the local union signatory, but is deemed to be made on behalf of all other sister locals throughout Ontario. Finally, as a result of section 137(2) of the Act, wherever a local union has established a foothold in any geographic area in Ontario, an employer will be deemed to have recognized its sister locals throughout Ontario. Section 137(2) was part of the package of amendments introduced in 1980 and was necessary to further consolidate and rationalize the bargaining structure which, in some instances, was still fragmented and uneven in its application. Section 137(2) extends local bargaining rights province-wide by operation of law and therefore obliges an employer with ICI bargaining rights in one area of the province to apply the ICI provincial agreement wherever it does ICI work in Ontario.

20. In summary, the *general* thrust of the legislation is quite simple: in the ICI sector of the construction industry the norm is to be provincial bargaining through designated provincial bargaining agencies, a provincial collective agreement, and no local bargaining, collective agreement “or other arrangement” inconsistent with the foregoing.

21. Certain bargaining relationships involving concrete formwork constitute a limited exception to the provincial ICI regulatory scheme. Pursuant to section 139(2), the Ministry of Labour has explicitly excluded from the Labourers’ employee designation, the collective bargaining relationship between the Form Work Council of Ontario and the Ontario Form Work Association. That agreement is a provincial collective agreement with a council of unions including, primarily, Local 793 of the International Union of Operating Engineers, and Labourers’ Local 183, but potentially extending, as well, through its appendices, to Labourers’ Locals 247, 493, 527, 597, 837, 1036, 1059 and 1081 in their respective geographic jurisdictions. According to Mr. McKinnon, it was this agreement which served as a model for the London local formwork arrangement, but, he said, he was reluctant to “plug in” to the provincial Form Work Council agreement because Local 1059 might then lose some of its autonomy. Mr. McKinnon said that, as a matter of principle, Local 1059 has always asserted the right to make its own local bargain in respect of formwork in whatever sector such work might be done including the ICI sector. Concrete formwork, he maintained, was a recognized exception to the ICI bargaining scheme.

22. Local 1059’s formwork agreement does clearly purport to apply (*inter alia*) to ICI construction. The voluntary recognition agreement, signed in the shadow of a multi-sector certification application, recognizes Local 1059 as the bargaining agent for *all employees* engaged in concrete construction in Board Area 3 without reference to sector. So do succeeding collective agreements. The company was engaged in ICI construction at the time the voluntary recognition agreement was entered into. There is really no doubt that this Local formwork agreement was intended to apply to ICI construction work, and was, in fact, applied to ICI construction work when the company was engaged in those activities. It was not until the most recent collective agreement (1988-89) that Rockwall and Local 1059 have sought to restrict the application of the Local arrangement to residential construction; and Mr. McKinnon testified that these contractual changes were a response, in part, to the present proceedings. However, this in itself merely reinforces the conclusion that the prior agreements did, and were intended to, relate to ICI construction as well. Is this local London

formwork agreement inconsistent with the statute insofar as Rockwall purports to apply it to ICI projects? And does it nevertheless create ICI bargaining rights province-wide?

VII

23. Local 1081 argues that, pursuant to sections 144(4) and 137(2) of the Act, the initial voluntary recognition agreement with Local 1059, and the subsequent collective agreements, were intended to and did relate to ICI construction, and therefore would create ICI bargaining rights for Local 1081 as well, and also for all other Labourers' locals throughout Ontario. Local 1081 argues that one cannot create ICI bargaining rights then purport to limit them in ways which are not permitted by the statute. Once ICI bargaining rights are acknowledged, it is the provincial ICI agreement that must be applied. Local 1081 argues that, insofar as the London formwork agreement pertains to the ICI sector, it is inconsistent with section 146(2) of the Act, the terms of the Ministerial designation, and the potential exemptions from the provincial scheme contemplated by section 139(2). Local 1081 asserts that Rockwall is therefore bound by the provincial ICI agreement whatever its impressions may have been about the validity or extent of its purported local arrangement with Labourers' Local 1059.

24. Rockwall contends that its local formwork agreement does not fall within the ambit of section 146(2) of the Act because of the way in which the Minister has framed the designation and its stipulated exemptions. In Rockwall's submission, the Minister has decreed that, in certain circumstances, an affiliated bargaining agent (which Local 1059 clearly is under section 137, and must be if it is to exercise other ICI bargaining rights) will be deemed not to be an affiliated bargaining agent for the purposes of provincial bargaining; moreover, the Minister, Rockwall says, has specifically adverted to that possibility in the clarity note appearing in the designation. Counsel points out that the words of the designation suggest that affiliated bargaining agents, such as Local 1059, "have or *may acquire* bargaining rights, or are, or *may become* bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming...". The situation is not frozen as at the time the designation was made. Counsel asserts that, in the Minister's words:

With respect to bargaining on behalf of ... such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction, such locals are not affiliated bargaining agents within the meaning of clause *a* of section 137, nor are they included in or covered by this designation under section 139 nor are they or the said collective agreements and bargaining thereunder affected by section 133 of the *Labour Relations Act*.

Rockwall argues that this is precisely what has happened here: Rockwall has entered into a multi-sector, all employee concrete forming agreement restricted in its scope to the London area. Insofar as that collective agreement is concerned, Local 1059 is exempted from the designation and cannot be regarded as an affiliated bargaining agent. Section 146(2) can have no application, and there can be no vicarious extension of bargaining rights under either section 137(2) or 144(4) for the benefit of Local 1081, the applicant in these proceedings because, once again, for the purposes of concrete forming, Local 1059 is not an affiliated bargaining agent. Local 1081 has no "vicarious bargaining rights" and Rockwall's collective agreement, being exempted from the provincial scheme, has no application beyond the London area - even in the ICI sector. These applications must therefore be dismissed.

VIII

25. There are a number of difficulties with these propositions. First, it is not obvious how the Minister, in the exercise of his/her power of "designation and description", can declare that

something which is clearly an affiliated bargaining agent as a matter of statutory definition, and is so recognized in the designation itself, is not an affiliated bargaining agent in some circumstances or for certain purposes not recognized by the statute, - especially when section 139(2) quite specifically deals with the limited circumstances in which bargaining relationships may be excluded from the designation and therefore the provincial ICI regulatory scheme. It is not at all clear how an affiliated bargaining agent meeting the definition of section 137(1)(a) can cease to be an affiliated bargaining agent for some purposes by Ministerial decree; moreover, if the Minister's authority to "designate" and "describe" extended that far, section 139(2) of the Act would be entirely unnecessary. The Minister could simply "describe" the designated bargaining agency and the ambit of its authority, so as to exclude any local or other arrangement which the Minister considered appropriate - even if that arrangement applied to the ICI sector. We doubt that that was what was intended by the Legislature or that the Legislature intended that exemptions from the designation might be made (and therefore exemptions from the provincial bargaining scheme would be created) other than in accordance with section 139(2) of the Act.

26. Rockwall's local formwork agreement clearly does not meet the requirements of section 139(2). Rockwall is not an employer bargaining agency (see the definition of that term in section 137(1)(d)). Rockwall does not bargain with a council of trade unions. Rockwall's purported agreement is not province-wide. Indeed, even a close reading of the terms of the designation does not unequivocally support Rockwall's proposed interpretation, because the reference to multi-sector forming agreements, which might, by itself, suggest any number of them, is followed by the word "*namely*" indicating that the Minister had only two specific collective agreements in mind. We accept Local 1081's position that, despite some ambiguity in the language, what the Minister was exempting was the Form Work Council agreement and any other Labourers' local which might choose to opt into that agreement. Finally, it should be noted that in the penultimate paragraphs of the designation, where the Minister is expressly exercising the authority granted to him under section 139(2) of the Act, it is only the bargaining relationship between the Form Work Council and the Ontario Form Work Association which is excluded from the designation. Therefore, even if the Minister could exclude these other local arrangements from the provincial bargaining scheme (and, for reasons already mentioned, we doubt that such exclusion could be authorized other than under section 139(2),) the terms of the designation do not establish such Ministerial intention. When read as a whole, we think that, insofar as formwork is concerned, the Minister intended only to exempt from the provincial scheme, ICI formwork which was subject to a pre-existing, provincial formwork agreement, conforming to the requirements of section 139(2). Rockwall's agreement does not.

27. For the foregoing reasons, the Board concludes that the so-called "formwork agreement" between Rockwall and Local 1059, *insofar as it purports to apply to the ICI sector of the construction industry* is a collective agreement or arrangement other than a "provincial agreement" and, pursuant to section 146(2) is therefore "null and void". Since the collective agreements are null and void insofar as they pertain to the ICI sector, none of their provisions, including the recognition clause, can be relied upon by Local 1059, Local 1081, or any other Labourers' local (affiliated bargaining agent) in Ontario to create ICI bargaining rights. We do not think that Local 1081 can argue, on the one hand, that the collective agreement between Rockwall and Local 1059 is "null and void" because it is contrary to the ICI scheme, but at the same time assert that its recognition clause survives so as to provide a valid legal foundation for ICI bargaining rights for Local 1081 or other sister Labourers' locals throughout Ontario. If the agreement is null and void, that is the end of the matter.

28. There remains the question of the status of the voluntary recognition agreement between Rockwall and Local 1059 dated October 22, 1984. Does this voluntary recognition agree-

ment provide an independent foundation for Labourers' bargaining rights in Board Area 3, which all Labourers' local unions in Ontario can now rely upon under section 144(4) to assert ICI bargaining rights for all construction labourers in their respective geographic jurisdictions? Local 1081 asserts that if a voluntary recognition agreement purports to or is intended to confer bargaining rights in respect of any labourers performing any labourers' functions in the ICI sector, in any Board area in Ontario, then, by operation of law, the employer is deemed to have recognized the local unions as bargaining agent(s) for all construction labourers employed in all capacities throughout the Province. That, it is said, is the effect of sections 137(2) and 144(4) of the Act.

29. We do not agree.

IX

30. To illustrate the intended effect of section 144(4), it is useful to compare it with section 144(1) since, in many respects, the language of the sections is identical, as is their intent - namely, to ensure that whether the origin of ICI bargaining rights is by certification or by voluntary recognition, those rights will be provincial in scope, and held by all local unions across Ontario in their respective geographic jurisdictions. A certification application must be brought by an employee bargaining agency or, more commonly, by a particular local union on its own behalf, and also on behalf of other Ontario locals. As we have already noted, the statutorily prescribed bargaining unit must include all those employees who would be bound by the relevant provincial collective agreement, and the result is to create provincial bargaining rights held by particular locals, but exercised for bargaining purposes by the designated employee bargaining agency.

31. Section 144(1) is a parallel provision. A voluntary recognition agreement, insofar as it relates to the ICI sector is *deemed, by statute*, to be made on behalf of other local unions in Ontario, and the defined bargaining unit must include those employees who would be bound by a provincial collective agreement. The effect in both cases is that whether the origin of the bargaining rights is by certification or voluntary recognition, the provincial bargaining scheme is preserved; each local obtains ICI bargaining rights for its own geographic area, and the applicable collective agreement is the provincial agreement because the voluntary recognition arrangement *must* encompass all those employees who would be bound by it.

32. But what if it does not? What if the voluntary recognition agreement, on its face, does not extend to all employees who would be covered by a provincial collective agreement, but only some of them; and what if the subsequent collective agreements likewise purport to apply only to a "slice" of the ICI sector. Is that still a valid voluntary recognition agreement within the meaning of section 144(4), creating rights for all construction labourers - despite its clearly intended limitation; or do we simply say that the parties, by attempting to construct a voluntary recognition agreement, relating to the ICI sector, which does not encompass all employees who would be bound by a provincial collective agreement, have tried to establish a legal arrangement which is not permitted by the statute. That is certainly what Rockwall and Local 1059 have tried to do here because the company did not welcome the possibility of a provincial collective agreement applying to all of its construction labourers, and Local 1059 proposed what it believed to be an alternative.

33. It is arguable that a voluntary recognition arrangement does not survive the consummation of a collective agreement which must, by law, (see section 41 of the Act) contain its own recognition clause which supercedes anything else that has gone before, and in this case replaced and covered all of the employees embraced by the prior voluntary recognition arrangement. (See also section 49 which provides that there can be only one collective agreement at any given time.) More fundamentally, though, this voluntary recognition arrangement, for the reasons outlined, was structured in a way that did not comply with the requirements of section 144(4) of the Act. It did

not “include those employees who would be bound by a provincial collective agreement” and was never intended to do so. Do we deem it to be in compliance with section 144(4), thereby establishing bargaining rights which were never intended, or do we simply say, as in the case of the collective agreements flowing from it, that it too is of no force and effect. We are inclined to embrace the latter result as being more consistent with the statutory scheme. We find that the 1984 voluntary recognition arrangement, if it survives the subsequent collective agreements, is *ineffective insofar as the ICI sector is concerned* because it does not comply with the requirements of section 144(4). That being so, it does not provide an independent basis for Local 1081’s bargaining rights or present claim.

34. For the purpose of clarity, we wish to emphasize that nothing in this decision affects Local 1059’s bargaining rights, or any consequent collective agreement(s), to the extent that they exist or are exercised or applied *outside* the ICI sector. Those agreements are both valid and binding in accordance with their terms.

35. For the foregoing reasons, these two grievances are dismissed.

3536-87-R; 0010-88-U; 0609-88-U; 0696-88-U United Food & Commercial Workers’ International Union Local 175, AFL-CIO-CLC, Applicant v. **Royce Dupont Poultry Packers**, Respondent v. Group of Employees; United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC, Complainant v. Royce Dupont Poultry Packers, Respondent

Evidence - Practice and Procedure - Union permitted to play tape recording to witness as part of its cross-examination - No *voir dire* needed - Direction prohibiting communication of contents of tape to witness prior to hearing continued

BEFORE: R. Herman, Vice-Chair, and Board Members H. Peacock and R. W. Pirrie.

DECISION OF THE BOARD; September 16, 1988

1. The Board heard submissions of the parties with respect to whether and in what circumstances a tape recording might be played to the witness being cross-examined. The tape is alleged by counsel for the applicant union to be a recording of what occurred at a meeting of employees convened by the witness, Irving Ungerman. The statements Ungerman is alleged to have made at this meeting constitute in part the basis of the alleged unfair labour practice.

2. Having regard to those submissions, counsel for the union is hereby given leave to play the tape recording for Ungerman as part of counsel’s cross-examination. The tape can be played forthwith, without the Board first being satisfied as to its accuracy, provided counsel first gives Ungerman an opportunity to deny or agree that he made the alleged statements particularized. Ungerman has not yet been provided such an opportunity after being apprised of the tape’s existence.

3. Our direction prohibiting direct or indirect communication of the contents of the tape recording to the witness is hereby continued, until the tape recording is played in the hearing for Ungerman or the Board otherwise directs.

4. This matter is hereby set for continuation on November 14, 21 and December 5, 1988, and January 3, 4, 5 and 19, 1989.

5. The first three above dates were agreed to by the parties at the last hearing date. The parties also felt that perhaps five more days would be necessary. The four days in January were subsequently agreed to by counsel for the applicant and counsel for Mr. Maracle. Counsel for the employer subsequently advised that her client would not agree to setting so many additional days, but would only agree to January 19th. There was no suggestion that either counsel or her client were unavailable on the other January dates. Accordingly, as all parties were available and as seven more hearing days might well be necessary, the Board set all the days recited in paragraph 4.

2034-86-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Runnymede Development Corporation Limited, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Bargaining Unit - Certification - Construction Industry - Five individuals on list of employees in dispute - Whether Board should determine as a preliminary matter whether one disputed individual with respect to whom the intervener had filed membership evidence was an employee before addressing issue with respect to the other four - Board ruled it would hear the representations of the parties with respect to all five of the individuals in dispute - Board considering "other relevant factor" phrase in *E & E Seegmiller* - Persons in dispute employed as servicemen and doing the work of several trades - Board determining whether persons working as construction labourers or carpenters where two trade jurisdictions overlap - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *David McKee* and *Tony Bucci* for the applicant; *Mary Ellen Cummings* and *Irving Moss* for the respondent; *A. M. Minsky*, *E. Mitchell* and *Tony Pinto* for the intervener.

DECISION OF THE BOARD; September 20, 1988

1. By decision dated October 6, 1987 (reported at [1987] OLRB Rep. Oct. 1305), the Board, differently constituted in part, made a number of findings and preliminary determinations with respect to this application, and authorized a Labour Relations Officer to inquire into and report to the Board with respect to the list of employees in the bargaining unit found by the Board to be appropriate for collective bargaining in this matter.

2. Subsequently, the applicant took issue with the Labour Relations Officer's decision to proceed with his inquiry by examining all five individuals whose inclusion on the list of employees was in dispute and requested that the Board direct him to examine only the person on whose behalf the intervener had filed membership evidence in order to enable the Board to determine whether that individual should be on the list of employees and, concomitantly, the intervener's continued right to participate in the proceeding. By decision dated December 2, 1987, the Board ruled that it would not overrule or otherwise interfere with the Officer's decision and directed that the inquiry proceed.

3. By letter dated May 18, 1988, the respondent requested that the Board reconsider its October 6, 1987 decision insofar as it restricted the representations that the respondent could make with respect to the list of employees. The parties agreed that this panel of the Board should deal with the respondent's request, which had to be disposed of before the Board could hear the representations of the parties with respect to the Officer's report.

4. In its October 6, 1987 decision, the Board ruled that it would not permit the respondent to resile from an agreement it had made with respect to the list of employees, and, further, that it would not entertain evidence or representations from the respondent that are inconsistent with that agreement. It was that ruling which the respondent requested the Board to reconsider so that it might be permitted to make whatever representations it chose with respect to the Officer's report. The Board was also called on to determine, as a matter preliminary to hearing representations with respect to the Officer's report, whether it should determine whether the disputed individual with respect to whom the intervener had filed membership evidence was an employee in the bargaining unit on the day the application was made before addressing that issue with respect to the other four persons in dispute. The applicant took the position that the Board should do so, and submitted that if the Board found that that individual should not be included on the list of employees, the intervener would no longer be entitled to participate in the proceeding, and it would be unnecessary for the Board to consider the evidence with respect to the remaining four individuals in dispute.

5. Section 7 of the *Labour Relations Act* requires the Board to ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at the time determined under clause 103(2)(j) (i.e. the terminal date) before proceeding to determine the applicant is entitled to be certified as the bargaining agent of the employees in the bargaining unit. In this case, the inclusion on the list of employees of all five individuals has been placed in issue in the proceeding and there is evidence with respect to all five before the Board. In our view, it is not open to the Board to ignore evidence which is clearly relevant to issues the *Labour Relations Act* mandates the Board must determine (see *Cara Operations Limited*, [1985] OLRB Rep. Apr. 523 at paragraph 8; *Re Ontario Public Service Employees Union et al. and The Queen in Right of Ontario* (1984) 45 O.R. (2d) 70 (Div. Ct.)). Further, although paragraph 29 of the Board's October 6, 1987 decision seems, on its face, to leave open the possibility that the Board might first determine the status of the individual on whose behalf the intervener had filed membership evidence and therefore the intervener's continued right to participate in the proceeding, and only proceed to consider the status of the remaining four individuals in dispute if the first individual is held to be an employee in the bargaining unit, it is apparent from the December 2, 1987 decision (by the same panel which made the October 6, 1987 decision) that that was not its intent since the latter decision virtually foreclosed that possibility (although it is not evident that anyone considered the December 2, 1987 decision would have that result). In the result, the Board ruled (orally) that it would consider and hear the representations of the parties with respect to all five of the individuals in dispute, and determine whether or not they are employees in that bargaining unit for purposes of this application.

6. With respect to the respondent's request for reconsideration, the Board noted that the circumstances in this case are somewhat unusual in that the agreement from which the Board refused to permit the respondent to resile was not, as many agreements are, dispositive of an issue in the proceeding. Accordingly, and although we agree that it is generally inappropriate to permit a party to conduct itself in a manner inconsistent with an agreement that it has made, the Board determined that, in the circumstances of this case, it would be helpful to have the benefit of the respondent's unrestricted submissions. The Board therefore ruled (orally) that the respondent would be permitted to make whatever submissions it chose and that, to the extent that it was nec-

essary to permit the respondent to do so, the Board's October 6, 1987 decision was varied accordingly. The Board then heard the representations of the parties.

7. In *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, the Board commented, at paragraph 23, that:

... However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(see also *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 at paragraph 21).

8. In *Darrow Developments Ltd.*, [1987] OLRB Rep. Oct. 1238, the Board was faced with a situation where the evidence did not conclusively establish what work an employee whose status was in dispute was performing on the date of application and therefore found it appropriate to "... consider other relevant criteria, such as his job title, purpose for hire and the kind of work that he normally performed around the time the application was made". The Board went on to find that, on the basis of that evidence, it had "... no doubt that although Mr. Gagnon may on occasion have performed work normally done by construction labourers, Mr. Gagnon was not employed as a construction labourer on March 17, 1987", which latter date was the date of application therein.

9. The tests suggested in *E & E Seegmiller, supra* (and *Gilvesy, supra*) have been consistently applied by the Board since those decisions issued. It is evident that the purpose for looking to other criteria when there is no conclusive evidence with respect to the work being performed on the date of application is to determine whether it is more probable than not that the individual in dispute was an employee in the bargaining unit on the date of application. The fact that "primary reason for hire" was specifically mentioned in *E & E Seegmiller, supra* (and in *Gilvesy, supra*) does not mean that that factor will necessarily be any more (or any less) significant in any given case. It is merely an example of what the Board will consider to be a relevant factor. It is unnecessary, and probably inappropriate (and impossible), to try to set out any exhaustive list of factors that the

Board will consider to be relevant. What factors are relevant, and what weight is to be given to any relevant factor, will depend on the circumstances of each case. We also observe that in *E & E Seegmiller, supra*, and *Gilvesy, supra*, the Board was concerned with on site employees only. Clause 117(a) of the Act contemplates that off-site employees who are commonly associated in their work or bargaining with on-site employees will be included in a construction industry bargaining unit and a “work done on that of application test” does not seem to be suited to resolving disputes with respect to off-site employees (see *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364).

10. The Labour Relations Officer’s report contains the information upon which the Board must make its determinations with respect to whether the individuals in dispute, or any of them, should be included on the list of employees. Satisfactory or not, it is only on the evidence before it that the Board can base its decision. There was no dispute that all five individuals in question were employed by the respondent and working in the construction industry on the date of application.

11. It is evident that all five employees in dispute were employed as “servicemen” and that in the course of their employment they did the work of several trades, including labourers’ work and carpenters’ work. In its October 6, 1987 decision, the Board commented, at paragraph 23, on the distinction between the labourers’ work and carpenters’ work:

23. Some of the work covered by the Housing bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters’ apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the “Carpenters”) or by members of the Labourers’ International Union of North America (the “Labourers”). It is both “labourers work” and “carpenters work”. In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter’s apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

How does one determine whether an employee who is working in one trade or another in circumstances where the two trade jurisdictions overlap, as do those of construction labourer and carpenter? It is no easy matter to do so particularly when the work being performed comes within the overlap. However, the determination must be made and can only be made by considering the evidence as a whole and bringing to bear the Board’s own expertise.

12. In this case, it was quite clear what Minuil Lima (referred to in the October 6, 1987 as Emmanuel Lima) and Michael (Mike) Robertson were doing on the date of application. It is evident, and was virtually conceded by the applicant, that Lima spent the majority of his time on the date of application doing carpentry work, specifically applying 2 x 4 strapping and plywood to the top of a building at Gerrard Street East and Victoria Park Avenue, and that he should therefore be included on the list of employees. It was also evident that, although Robertson spent a portion of his time measuring and cutting plywood for Lima to apply, he spent the majority of his time on the date of application assisting Lima by handling the material for him in a manner similar to that of construction labourers who work in a mixed crew with carpenters. Accordingly, the Board was satisfied that Robertson was not doing work in the bargaining unit applied for herein on the date of application.

13. Unfortunately, the evidence was less satisfactory with respect to Tony Iaccino, Andy

Campbell, and Sam Primerano, the remaining three employees in dispute. There is no doubt that Iaccino, Campbell and Primerano all did some carpentry work in the course of their employment. It is evident, however, that Primerano did relatively little such work, that he was not hired to do such work, that he was paid well below the rate being paid to carpenters at the time, and that he did not consider himself to be a carpenter. His job was primarily to "clean up" newly built houses. Accordingly, the Board was satisfied, on the evidence before it, that it was highly improbable that Primerano was an employee in the bargaining unit on the date of application. Similarly, Campbell thought of himself as a labourer, was paid at far below the wage rate being paid to carpenters, and did not normally do much carpentry work. In the Board's view, Campbell was not an employee in the bargaining unit on the date of application either.

14. Iaccino presented the most difficult question for the Board. It seems that he was somewhat more skilled than Campbell and Primerano, which is reflected in the higher wage rate that he received. However, his wage rate seems to have been significantly lower than that paid to carpenters at the time and he was not hired as a carpenter. Finally, although his subjective view was that he possessed similar skills to those of Lima, the Board was not satisfied, on the evidence before it, that it was more probable than not that Iaccino was doing carpentry work on the date of application. Accordingly, the Board found that Iaccino was not an employee in the bargaining unit on the date of application.

15. In the result, the Board ruled (orally) that, of the five individuals in dispute, one, Minuil Lima, was an employee in the bargaining unit on the date the application was made and that the other four, Andy Campbell, Michael Robertson, Sam Primerano, and Tony Iaccino were not. The Board therefore determined that there were three employees in the bargaining unit on the date of application:

Brian Bursey
Minuil Lima
Scott Wells

16. In support of its application for certification, the applicant filed documentary evidence of membership consisting of two Certificates of Membership. Both certificates are checked and certified correct by an officer of the applicant and indicate that the individuals on whose behalf they have been filed were members of the applicant on the terminal date fixed for the application. The applicant also filed a Form 80, Declaration Concerning Membership Documents, Construction Industry, attesting to the regularity and sufficiency of its membership evidence.

17. The Board was satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on October 28, 1986, the terminal date fixed for the application and the date which the Board determines, under clause 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under subsection 7(1).

18. Subsection 144(2) of the Act provides for the issuance of more than one certificate if the applicant has the requisite membership support. Therefore, pursuant to subsection 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 of the Board's October 6, 1987 decision herein in respect of all carpenters and carpenters' apprentices, in the employ of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, and also pursuant to subsection 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, in the Towns of Ajax and Pickering, in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0103-88-OH; 0104-88-OH Martin Bracey, Complainant v. Anil Bhatia, Respondent; Martin Bracey, Complainant v. **Scarborough General Hospital**, Respondent

Arbitration - Health and Safety - Discharge grievance taken to arbitration - Grievance allowed but complainant not reinstated - Board without jurisdiction to hear health and safety complaint - Complainant having made election and had allegation of reprisal dealt with by arbitration - Complaint dismissed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and P. V. Grasso.

APPEARANCES: Martin Bracey and Patrick Sheppard for the complainant; Tim Sargeant for the respondents.

DECISION OF THE BOARD; September 16, 1988

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* ("OHSA") against the two respondents, the complainant's supervisor and employer respectively, claiming reprisals for exercising his rights under the *Occupational Health and Safety Act*. This decision deals only with the employer's preliminary objection that the matter had already been dealt with by arbitration and that therefore the Labour Relations Board has no jurisdiction to hear the matter. The complainant takes the position that the arbitration did not deal with his health and safety complaint, or section 24 of the OHSA. The motion was argued on the basis of documents, affidavits and stated facts. No oral evidence was heard.

2. Mr. Bracey was hired by the hospital as a respiratory therapist on October 13, 1985. He was fired on March 5, 1986 and grieved the termination on March 7, 1986. The discharge letter, dated March 5, 1986 states that the discharge was made "based on your employment record and continued unacceptable behaviour and actions in the respiratory services department". The grievance stated that he had been unjustly dismissed from his job at the Scarborough General Hospital and requested reinstatement with full redress. Following an unsuccessful grievance meeting, the discharge grievance was advanced to arbitration by the grievor's union, together with a grievance concerning a prior disciplinary letter, and was heard by a board of arbitration on nine days of hearing starting on November 24, 1986 and ending on November 27, 1987. After hearing the employer's case and the grievor's evidence-in-chief, the board of arbitration suspended the hearing and issued an award without completing the hearing. This followed its decision that it was impossible to proceed because of the grievor's attacks on the integrity of the board. The board decided that the grievor's allegation that the hospital was responsible for his impairment of health was not before them and that the sole issue was just cause. The board of arbitration allowed the grievance on the disciplinary letter in part and found that the discharge was without just cause but did not order

reinstatement because of its finding that the employment relationship with the hospital had been "shattered irreparably". The board of arbitration added "apart from any consideration of his health (and we make no finding in that regard), it is inconceivable that he could work in the hospital again". Three weeks of damages were awarded instead because of the short time that the grievor had worked for the hospital. This money was paid by the hospital.

3. The worker had invoked section 23 of the *Occupational Health and Safety Act* prior to his discharge based on his conviction that his asthmatic condition was incompatible with exposure to glutaraldehyde in his workplace. His affidavit indicates that the employer then ordered him back to work. After he was discharged he asked his union to file a health and safety complaint, but his union declined to do so at that time. At the local union level he was informed that the employer was aware of the complaint and was investigating the facts surrounding his discharge. Mr. Bracey went to the Ministry of Labour's Occupational Health and Safety Branch and spoke to an officer, and "made three specific complaints": 1) that the work environment at the hospital was unsafe and that it violated a specific agreement made to him upon hiring that he would not be exposed to glutaraldehyde; 2) that the exposure might be affecting other workers; and 3) that he had been terminated for making an occupational health and safety complaint and claiming Workers' Compensation benefits. He was then informed that he had to take the complaint through the grievance procedure provided for in his collective agreements since he was covered by a collective agreement. The concerns that the grievor later related to the Ministry of Health also reflected his concern for the effect of the chemical on other workers and patients.

4. After the arbitration award was released and received by the grievor in early January 1988, he again went to the Occupational Health and Safety Branch and discussed with them, in the words of his affidavit, "the fact that I had had the possibility of elections excluded by being told that I must use the avenue of the grievance procedures since I belonged to a bargaining unit. They were emphatic in pointing out to me that whoever had told me that had misinformed me, that it was then and remained my right now to make such a complaint."

5. The earlier contacts with the Occupational Health and Safety Branch had resulted in an inspection report dated April 9, 1986 from the Industrial Health & Safety Branch which lists as the purpose "to investigate Mr. Martin Bracey's claim of unjustified termination". In the memo to the employer which is attached, the purpose is stated as "the investigation of Mr. Martin Bracey's claim of a possible exposure to glutaraldehyde which was reported to the Ministry of Labour on March 12, 1986". As the air quality reading was within the threshold limit identified by the Occupational Health and Safety Division, the report concluded that no contravention of the *Occupational Health and Safety Act* was made out. However, the Occupational Health and Safety Division's field visit report dated May 7, 1986 indicated that, although the airborne exposures were below dangerous levels, in their view the exposure could have aggravated Mr. Bracey's asthma and therefore exposure was to be avoided.

6. It is clear from the submissions of counsel for Mr. Bracey and the affidavit of Mr. Bracey that he considered the occupational health and safety complaint and the discharge grievance to be separate and distinct. He had sent a memo to his supervisor on February 24, 1986 outlining his concerns about his deteriorating health, which he intended to be a health and safety complaint. He did not wish to give up his occupational health and safety complaint by going to arbitration on the grievance. Further, the affidavits from Mr. Bracey and his union representatives indicate that neither the grievance procedure nor the arbitration dealt with Mr. Bracey's ongoing concerns regarding occupational health and safety. However, it appears that little, if any, distinction was made by the grievor between his allegations of deterioration of his health and being ordered to work in an area he considered unsafe, elements which alone would not be within the Board's jurisdiction, and

his complaint that the employer disciplined him because of these factors which can fall within the Board's jurisdiction under section 24(2).

7. Complainant's counsel argues that the board of arbitration itself did not accept that it had any jurisdiction to deal with the occupational health and safety complaint and that the board of arbitration made it clear that it was fashioning a remedy without consideration of the health and safety complaint. Counsel for Mr. Bracey acknowledged that the health and safety matters were part of the arbitration to the extent that reinstatement without the elements of removal from exposure to glutaraldehyde would cause the grievor to be ill and therefore would not have been what he was seeking. However, he argues that at no time did the union intend to make a grievance of the occupational health and safety complaint and that therefore the union should not have been held to have elected either. His overriding concern is that the occupational health and safety issues per se have never been dealt with.

8. Mr. Bracey's counsel stresses that there was no meeting about the occupational health and safety complaint with the hospital at all, only a termination meeting. Counsel argued strenuously that neither in fact nor in law had there been an election in that neither the union nor the complainant had intended to elect arbitration over the route at the Labour Relations Board for the occupational health and safety complaint.

9. Hospital counsel argues that the election is found by operation of law in going to arbitration and that the preliminary objection should also be upheld because the complaint was filed two years after the event. He argues that the matter has been dealt with in that the arbitrator has come to the conclusion that there will be no reinstatement but has granted compensation which has been cashed by the grievor without objection from the union or the grievor.

10. Hospital counsel maintains that the only reason Mr. Bracey is trying to enforce his rights at the Ontario Labour Relations Board is that he was unsuccessful before the Board of Arbitration. He stresses that the remedies at the Board are much the same as those at arbitration and that the Board has dealt with the remedies available to Mr. Bracey.

11. Counsel for the complainant submitted that Mr. Bracey should not be precluded from having his OHSA complaint dealt with by the Board unless we find that he had intentionally elected to forego his remedies at the Labour Board. Further, he stressed that the complaint against Mr. Bhatia, a professional colleague as well as a supervisor, was separate from the complaint against the hospital and should be dealt with on its merits regardless of what we found on the complaint against the hospital, and that the parties in the grievance and the OHSA complaint against Mr. Bhatia were not the same. He suggested that there was no impediment to the complaint going forward against Mr. Bhatia for a separate and severable remedy which would not include reinstatement, but that if one went forward he suggested that they should both go forward. Counsel for the employer's response to this argument was that the remedies are not personal to the supervisor but are against the employer, citing section 24(7) of the OHSA in particular.

12. Sections 24(1) and (2) of the *Occupational Health and Safety Act* provide as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or

- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

13. The Board has dealt with the question of election under section 24 of the *Occupational Health and Safety Act* in a number of cases. In *Reed Limited*, [1982] OLRB Rep. Jan. 1, the question considered was the manner in which an employee represented by a trade union may bring a complaint under the predecessor to the current section 24 which was section 9 of the *Employee's Health and Safety Act 1976*. Section 9(2) of that Act was substantially the same as section 24(2) of the current Act providing:

"Where an employee complains that an employer has contravened subsection (1), the employee may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply *mutatis mutandis* to the complaint".

In that case individual grievances were lodged with the employer and processed to the first stage of the grievance procedure after the occupational health and safety complaint had been filed, but the grievances had not been withdrawn at the time of the Board's hearing. The respondent employer argued that the employees had elected arbitration and must pursue that route exclusively. The Board decided that the employee had not yet elected arbitration because the matter was still in the grievance procedure. At paragraph 13 it held as follows:

... The Board, therefore, should not foreclose an employee from bringing a complaint before it simply because that employee has had his union take the matter through the grievance procedure. Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

14. In the *Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283, the Board dealt with a situation where a discipline grievance had been processed up to the point of scheduling a hearing with a board of arbitration. The hearing had not taken place at the point at which the parties appeared before the Board on a related OHSA complaint. The complainant's counsel argued that the arbitration would deal with the matter of whether there had been an improper lay-off, but that the Board could and should deal with the OHSA issues itself. In declining to sever the issues in this way, the Board wrote at paragraph 10:

... The "matter" referred to in section 24(2) is the alleged violation of 24(1), namely, that an employer acted to penalize a worker, as set out in sub (a) to sub (d), because the worker complied with or sought enforcement of the OHSA. That issue of improper (or unjust) discipline is the "matter" to be heard at arbitration or before the Board. While the respondent asserts that the undisputed fact that the complainant is no longer an active employee is as a result of layoff, there is no doubt that section 24(1) of the OHSA is integral to the grievance should the grievance be adjudicated in an arbitral forum. The grievance form itself refers to "termination without just cause" rather than improper layoff or some such language. Section 24(1) affords workers a right of protection from penalties for invoking the OHSA; that right is enforceable under the legislation either at arbitration or before the Board. ...

The Board suggested that a complainant might be allowed in some circumstances to come before the Board where he or she had objected to the union's taking the matter to arbitration or where a grievance had been settled without the complainant's consent. However, in *The Great Atlantic & Pacific Company of Canada, Limited*, [1987] OLRB Rep. May 714, where a complainant had agreed to the settlement of a grievance to the effect that he was reinstated with seniority but without compensation and two months later came to the Board with a OHSA complaint trying to recover the lost earnings, the Board again said that the just cause and OHSA matters could not be severed. The Board wrote at paragraph 7:

When a worker feels that he or she has been affected by a contravention under section 24(1) of the O.H.S.A., subsection (2) requires the worker at some point to make an election of the forum in which he or she will seek a remedy. At some point, a worker must choose either to proceed before the Board or to proceed under the arbitration provisions of the relevant collective agreement. See, *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283, and the cases cited therein. It is not necessary for us to define with precision at what point the worker must make an election. But having elected one forum and having obtained a determination of the issue in that forum, a worker cannot then attempt to obtain a remedy in the other forum. Implicit in section 24(2) and the choice of procedures set out therein is the recognition of the undesirability of having the same issue litigated in two quite different forums. We agree with the comments of the Board in *The Municipality of Metropolitan Toronto*, *supra*, at paragraph 10, where the Board stated that the O.H.S.A. issue raised by a grievance is not severable in the sense that one can take the just cause aspect of a discharge to arbitration and the O.H.S.A. aspect to the Board. The issue of whether the discipline was proper is one issue and with respect to that issue a worker must at some point choose in which of the two forums he or she will seek a remedy.

For a similar approach, with a different result, see *Inco Metals Company*, [1982] OLRB Rep. May 681. The fact that the union had withdrawn the matter from arbitration allowed the complainant to go ahead with the OHSA complaint.

15. The nub of the problem on the facts before us is whether or not "the matter" has been dealt with by final and binding settlement by arbitration. The task is made somewhat difficult by the fact that the grievance, as is usual, is not particularized in the way the complaint made to the Board is. However, it is clear from all the material before us that it is the complainant's theory of the case both before the Board and at arbitration that he was disciplined and dismissed unfairly because of his activities in trying to protect his health and safety under the OHSA. Section 24(1) provides that no reprisals shall be taken against a worker because he or she has acted in compliance with or sought enforcement of the OHSA. The election in subsection 24(2) is as to how a matter of the allegation of a contravention of subsection (1) will be dealt with. The substance of a contravention of subsection (1) is that a person was disciplined, penalized or intimidated because of the exercise of rights under the OHSA. In our case the worker alleges that he was disciplined, discharged and unfairly dealt with because he was seeking compliance with the OHSA. That is "the matter" of the complaint. We then must ask whether the worker had that matter dealt with by final and binding arbitration or not? The answer is clearly, "yes". The essence of the worker's complaint, embodied in his grievance, which was taken to arbitration without objection, was that he was unjustly dealt with because of his activities under the OHSA. There was no evidence that the worker did not intend to have his grievance dealt with at arbitration. The fact that he did not at any time explicitly state that he was choosing the arbitration route over the OHSA route does not change the fact that he has had the matter dealt with by final and binding arbitration. The wording of the statute requires no explicit intention to forego the right to come to the Board or expression thereof; it merely says "the worker may have the matter dealt with ...". Having that matter dealt with involves adjudication concerning the employer's motivation for discharge, which was done by the arbitration board. The fact that the arbitration in this case was discontinued in mid-stream undoubtedly leads the worker to feel that the matter has not been dealt with. However, once the

grievance which is relating to the matter set out in section 24(1) has been taken through the arbitration process, whether or not the grievor is satisfied with the way in which it was dealt with, it cannot be said that it was not dealt with. Otherwise, the election in section 24(2) could come to depend on how an arbitrator or the Board framed its decision. We note that whenever there is a defended claim of discharge for reprisals under the OHSA, an employer who is defending the case will give other, non-reprisal reasons for the discharge. Due to the reverse onus obligation on the employer, the focus of the adjudication, whether before the Board or under the collective agreement, will be, at least initially, the reasons given by the employer and whether they constitute unjust discipline. Almost universally these will be non-OHSA reasons and will involve allegations of fault on the part of the employee in some way. It will not be surprising then for the matter to look in some cases as if the OHSA issues are not being dealt with since they are not pivotal to the employer's allegations against the employee.

16. As to the complaint against Mr. Bhatia, the allegations of reprisal in the complaint filed with the Board are substantially the same. There are no incidents complained of against Mr. Bhatia which are not also complained of against the hospital. They all relate to the sequence of events immediately preceding and ending in the worker's discharge. Also, the allegations against the hospital relate to actions by Mr. Bhatia as the worker's supervisor. We cannot find that it has a status any different from the complaint against the hospital for the purposes of section 24(2).

17. The jurisdiction of the Board under section 24 is not broad. It is not a jurisdiction to enforce the OHSA or safe working conditions for workers in general. It is limited to protecting them from reprisals for seeking their rights under the OHSA. The election in section 24(2) is quite separate from the enforcement provisions under Part VIII of the OHSA which provide an enforcement route beginning with an order from an inspector and moving on to an appeal to the Director and the offences and penalties sections set out in Part IX of the OHSA. The legislature has given to the Labour Board only the right to adjudicate the question of employer reprisals as an alternative to arbitration under a collective agreement. We have found that the worker has had this allegation of reprisal dealt with by arbitration under the collective agreement and we are therefore without jurisdiction to hear the complaint. The more general allegations concerning health and safety set out in paragraph 3 above, would not, alone, have been within the Board's jurisdiction, whether or not the complainant had had the matter of his allegations of reprisal dealt with by a board of arbitration.

18. As we have decided this matter under section 24 of the *Occupational Health and Safety Act*, it is not necessary to deal with the issue of delay raised by hospital counsel.

1876-85-U Southern Ontario Newspaper Guild, Local 87 of the Newspaper Guild, Complainant v. Toronto Star Newspapers Limited, Respondent

Duty to Bargain in Good Faith - Interference in Trade Unions - Unfair Labour Practice - Employer issuing written communications to its employees setting out its position with respect to negotiations - Communications undertaken only after the employer's positions had been given to the union across the bargaining table - Board examining employer communications in the context of a long-established collective bargaining relationship - Communications not suggesting to the employees that they could negotiate directly with the employer nor seeking to have the employees reject the union as their bargaining agent - Complaint dismissed

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *I. M. Stamp* and *P. V. Grasso*.

APPEARANCES: *H. Goldblatt*, *S. Liang* and *John Bryant* for the complainant; *Derek L. Rogers*, *Ian Werker*, *C. J. Davies*, *Peter Dawson* and *Kare Grant* for the respondent.

DECISION OF THE BOARD; August 31, 1988

1. The complainant, hereinafter referred to as the Guild, and the respondent, hereinafter referred to as the Toronto Star, have had a collective bargaining relationship since 1949. The Guild complains that the Toronto Star violated various sections of the *Labour Relations Act* by issuing written communications to its employees setting out the Toronto Star's position with respect to the negotiations that were taking place with the Guild about the renewal of the collective agreement which had expired on July 31, 1985. Those negotiations were ultimately successful with the parties entering into their 27th collective agreement in November 1985.

2. The negotiations began in July 1985. A conciliation officer was appointed by the Minister of Labour on September 19, 1985 at the request of the Guild. The conciliation officer met with the parties three times. On October 11th, the Guild asked the conciliation officer to issue a "no board report". On October 25, 1985 the Minister informed the parties that he did not consider it advisable to appoint a conciliation board. The parties had met 13 times prior to the release of the no board report.

3. From August 1985 and throughout the negotiations, the Guild issued bargaining bulletins to keep its membership informed about the progress of the bargaining. John Bryant, Executive Officer of the Guild and the chief spokesman of the Guild's bargaining committee, explained that the Guild's bargaining committee decided on the timing and content of the bargaining bulletins.

4. The Guild also issued documents entitled "Bargain Hunter" later in the negotiations. The Bargain Hunters were prepared by a publicity committee created to assist the bargaining committee. Mr. Bryant testified that the publicity committee checked with the bargaining committee when writing the Bargain Hunters, but the bargaining committee did not actually review the Bargain Hunters before they were issued.

5. The Toronto Star issued what it referred to as "Management Reports" three times during the negotiations. Its first Management Report was issued on October 21, 1985, two days before a scheduled mediation meeting. By that date, the Guild had issued several bargaining bulletins, most of which contained, in the opinion of the Toronto Star and an opinion which we believe was not unreasonable, several exaggerations, omissions, and in some cases actual misleading statements.

6. We need refer only to some examples in the material published by the Guild. In bargaining bulletin #6, headlined "Star is Still Arrogant", the Guild wrote:

"We struck the Star in 1983 on the issue of fairness and won. In the current round of negotiations it's still among our key concerns at the bargaining table.

One of the ways we are trying to address it is by instituting some respect for seniority at the Star because frankly it's the only effective alternative to the present coercion of employees by the all too frequent use of scheduling, promotions and job selection as a disciplinary tool.

But when we present our needs to the Star they're dismissed with arrogant truculence. 'I think the union is aware just how negatively we view any of their concerns from the point of view of seniority bidding (sic),' Davies said on Tuesday, even before he'd read a newly rewritten version of our seniority language.

"We aren't going to agree," Davies blustered. "If they're going to push us down that road there are going to be difficult times ahead," he declared. What is the spectre of seniority that haunts Davies, that he's blamed for the demise of both the British empire [sic] and the Toronto Telegram? Nothing more than a childishly simple 9 point proposal to establish seniority lists at the Star. Of course we hope the lists will achieve more than tell you how long you've worked at the Star.

We'd like to see seniority become one of the factors taken into account when an employee seeks a promotion; as a basis for establishing some more permanent shifts in editorial where several senior employees are already accorded the right of seniority; in bidding for runs in the delivery department; and to end some of the woes of outside circulation we're proposing that vacant positions are bulletined and seniority determines who fills them. So seniority lists are vital in establishing a defense against present arbitrary and manipulative management practices."

7. Mr. Bryant, in cross-examination, conceded that seniority was a factor in the expired collective agreement with respect to vacations, vacation timing, choice of shift in the delivery area, selection for trial periods for promotion, and staff reductions. Mr. Bryant also conceded that the collective agreement language dealing with promotion was principally a skill and ability competition among applicants for a posted job with seniority a factor, albeit relatively low in respect of the attributes considered by the Toronto Star for a promotion. Mr. Bryant also agreed that only two grievances were filed out of the 132 job postings under the Guild's collective agreement. Additionally, the "childishly simple 9 point proposal to establish seniority lists" referred to in bargaining bulletin #6 was a detailed two-page document which, among other things, proposed the creation of seniority groups within the bargaining unit based on pay groups. It became clear from the evidence of Mr. Bryant that the Guild's seniority proposal was a complex concept involving a substantial change from the seniority scheme which existed under the recently expired collective agreement.

8. Bargaining bulletin #6 also stated:

"The Star made a record \$47.2 million in profits last year, but that's not prevented mean spiritedness from entering its proposals. It wants to end its commitment to full support of OHIP and its 50 percent share of Blue Cross payments by freezing its contributions at July 31 levels."

Mr. Bryant maintained that that statement was fair, but agreed in cross-examination that the Toronto Star paid a 90% share of Blue Cross, and not 50%. Mr. Bryant did ultimately agree that the statement should have been "more accurate".

9. That bulletin also stated:

"The Star also wants the right to have its hand in the pocket of disabled workers by demanding a share of any compensation Star employees, the victims of accidents, win from third parties. The amount would cover payments made under the Star's disability plan.

Think it's a bad joke? In bargaining Davies has said that if the Star doesn't get its way he'll cut off the wages of the disabled."

The Toronto Star's proposal was intended to allow it to seek recovery from a third party for the benefits that the Toronto Star paid to an employee who was injured in an accident. In effect, the Toronto Star was seeking to end the situation where an employee would be paid benefits by the Toronto Star as reimbursement for loss of wages and also recover a loss of wage claim from the third party who caused the employee's loss. Mr. Bryant said he could not remember Chris Davies, the Star's spokesman in negotiations, ever having said that he would "cut off the wages of the disabled" employees and agreed in cross-examination that if such a statement had not been made, then it should not have set out that way in the bulletin.

10. Peter Rickwood, a member of the Guild's executive and an editorial department representative on the bargaining committee, wrote many of the bargaining bulletins issued by the Guild. He explained that he wrote bulletin #6 and it was reviewed by the entire bargaining committee.

11. With respect to the seniority issue, Mr. Rickwood did not disagree in cross-examination that Mr. Davies' comments with respect to seniority related to job bidding based on seniority although Mr. Rickwood had the impression that Mr. Davies was referring to seniority generally.

12. Mr. Rickwood also indicated in cross-examination that Mr. Davies had not said anything about cutting off wages, but rather Mr. Rickwood's notes of the meeting made a reference to benefits. Mr. Rickwood also agreed in cross-examination that the discussion related to the Toronto Star seeking to recover the wages the Toronto Star paid to an injured employee was explained by Mr. Davies as having the Toronto Star sue the third party who caused the injury by having it join in the employee's action to recover the wage loss claim from that third party.

13. Mr. Rickwood also agreed that the tenor of the bargaining bulletins issued by the Guild to its members was derisive of the Toronto Star and was intended to convey to the employees the sentiments of the bargaining committee.

14. The Management Reports issued by the Toronto Star set out its position with respect to many of the issues raised by the Guild in bargaining and were positions that had been conveyed to the Guild's bargaining committee prior to publication. The Toronto Star's first communication to its employees was responsive to the issues raised by the Guild at the bargaining table and in the Guild's bulletins to its members. That first Management Report dealt in detail with the Guild's seniority proposal, set out the agreed-upon health and safety language, commented upon other issues and also responded to the following comment set out in a Guild bulletin which Mr. Rickwood had written and which he agreed was intended to be derisive of the Star:

"Applying the logic of an overseer of a Victorian workhouse for the poor, Jolley wants us to appreciate the quality of the working environment (new paint etc.) and the Star's 'more forcible dealings with employees' needs' when we go cap in hand. As well as the monetary offer the Star's offer also gave the boot to seniority, Sunday double pay and a contentious proposal to grab compensation awards from disabled Star employees is back to haunt us."

The Toronto Star's Management Report contained the following statement:

"From Guild Bargaining Bulletin #7 *"a contentious proposal to grab compensation awards from disabled Star employees ..."* The Star is suggesting that if an employee is disabled and prevented from working as a result of an accident for which a third party is responsible, the employee who has received (and will continue to receive) disability benefits from the Star should be willing to reimburse the Star for the amount of those benefits if that money is retrieved from the third party who is responsible for the accident."

15. The Toronto Star also issued a second Management Report setting out its position on the Guild's comprehensive response to the Toronto Star's offer of October 11, 1985. That report accurately described the position the Toronto Star had taken with the Guild's bargaining committee at the mediation meeting of October 23, 1985. That report was issued on October 24, 1985 and indicated that the Toronto Star had moved on a number of issues. During the course of the October 23rd mediation meeting, the Guild had not raised any concern, and indeed had made no reference to the one error in the first Management Report that the Toronto Star had issued on October 21st.

16. The Toronto Star knew, by reason of earlier Guild bulletins, that the Guild had called a meeting of its members for October 27th for the express purpose of obtaining a strike mandate from its membership. The Toronto Star did not advise the Guild during the mediation meeting of October 23rd that it would issue a Management Report outlining its position, nor did the Guild advise the Toronto Star that it was about to release a tabloid-size publication entitled *Bargain Hunter* carrying the date of October 23, 1985 on its masthead. The *Bargain Hunter* tabloid, which had been written several days before the bargaining meeting of October 23, did not reflect the Star's changed position. It also was written in the same manner and tone as the earlier bulletins and also contained several inaccuracies about the Star's position that had been tabled prior to the October 23rd meeting. Mr. Rickwood agreed that the *Bargain Hunter* tabloid of October 23, 1985 was not simply reporting, but rather contained opinions of the writers who were trying to get the Guild's members to support the bargaining committee. Although the Guild considered issuing an update to the October 23rd *Bargain Hunter*, it decided not to because the bargaining committee would explain its position and the Toronto Star's response to the members attending the meeting of October 27th.

17. The Toronto Star also issued a third Management Report on November 8, 1985 accurately outlining the terms of the offer that the Toronto Star had made to the Guild's bargaining committee shortly before the time that a legal strike or lockout could commence.

18. Between October 21, 1985, the date of the first Star Management Report and the ratification of the collective agreement, the Guild issued several bulletins entitled *Bargain Hunter* discussing various issues in dispute in negotiations. The Star issued its second Management Report after the mediation meeting on October 23, 1985 and a third management report on November 8, 1985. There was no other attempt by the Toronto Star to communicate with its employees during the bargaining period.

19. The Toronto Star and the Guild have had a history of issuing communications to employees represented by the Guild for many years prior to 1985. Mr. Bryant testified that he complained about the Toronto Star's practice in the past, and had lodged an unfair labour practice complaint before the Board previously, but had not proceeded with it. Mr. Davies testified that the Toronto Star does not communicate in the same way with its employees in the other bargaining units represented by different craft unions because those unions do not make ongoing reports of negotiations, but wait until a final proposal is made at the bargaining table. The Guild, on the other hand, reports on positions taken during the negotiations, whether finalized or not, and in Mr. Davies' experience, the Guild's reports of the Toronto Star's positions are not always accurate.

20. Mr. Davies explained that the Toronto Star issued its first report on October 21, 1985 to provide the employees with information on the company's positions and also to clarify the mistakes and distortions which the Toronto Star believed were contained in the Guild's bulletins. The Toronto Star issued its second report because it knew that the Guild meeting of October 27th was

going to be used to give the bargaining committee a strike mandate. The Toronto Star wanted its employees to know what its position was on the issues before that meeting. Mr. Davies was not aware that the Bargain Hunter dated October 23rd was going to be released, nor was he aware of its content.

21. Prior to the issuance of the third report, the Toronto Star advised the bargaining committee that such a document would be issued. Mr. Bryant, on behalf of the Guild, was incensed that the Toronto Star was going to apprise employees about the final offer made to the Guild's bargaining committee. Mr. Davies was of the view, based on the bulletins that had been issued by the Guild, that the Toronto Star's position would not be fairly put to the employees.

22. Mr. Davies, at the meeting with the Guild of November 7th where he presented the Guild with the Toronto Star's final offer, thought that there would be a strike because there were several issues remaining in dispute of which at least four were issues on which the Toronto Star would take a strike. Mr. Davies testified that he wanted the employees to know what was remaining in dispute between the Guild and the Toronto Star if they were going to go on strike. Mr. Davies also stated that he did not wish to bargain with individual employees and understood and respected the role of the Guild as the employees' bargaining agent, but believed that as an employer, he had a right to ensure that employees had sufficient and accurate knowledge of the issues in dispute before deciding whether to engage in a strike. Mr. Davies did concede, however, that even if the Guild had been entirely factual, he would still want the opportunity to communicate with employees.

23. The Guild's position, as expressed by Mr. Bryant during his testimony, is that it is the Guild's responsibility to communicate with its members about collective bargaining issues and that the Toronto Star's obligation is to communicate with the bargaining committee, and not the Guild's membership. Communication with the employees on bargaining issues is nothing more than an attempt to usurp the function of the bargaining committee. Counsel for the Guild submitted that the Toronto Star was, through its communications, competing with the Guild to attract the members' attention for the purpose of having the members repudiate their bargaining agent. Counsel pointed out that the Toronto Star's reasons for communication with its employees were to clarify and correct misrepresentations and provide the employees in the bargaining unit with full information so that those employees could make their decision based on all the necessary facts, and not just on what the Guild told the employees. Counsel argued that the Toronto Star, in not so subtle a fashion, was actually telling the Guild's members not to listen to the Guild because the Toronto Star was telling the truth and the Guild was not. Counsel also pointed out that the Toronto Star's second Management Report was not responsive to the errors or misrepresentations in the Guild's first Bargain Hunter because the Toronto Star was unaware of what the Bargain Hunter contained when it issued its second Management Report.

24. The complaint about the Toronto Star's conduct can only be sustained if the Board is satisfied that the Toronto Star contravened sections 64 and 67 of the Act. There was no evidence to support a finding that the Toronto Star, through its communications, acted contrary to either section 66 or 70 of the *Labour Relations Act* and therefore, the complaint is hereby dismissed insofar as it alleges a violation of those two sections of the Act. If we are satisfied that the Toronto Star, through its communications, attempted to bargain directly with its employees, such conduct would also establish a violation of section 15 of the Act.

25. Sections 64 and 67(1) of the Act provide:

"64. No employer ... shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union ... but nothing in this

section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

67.-(1) No employer ... shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them."

26. In *A. N. Shaw Restoration Limited*, [1978] OLRB Rep. May 393; [1978] Can LRBR 214, the Board discussed the relationship between a union's right to act as the exclusive bargaining agent on behalf of the employees it represents set out in section 67(1) of the Act with an employer's right to express its views set out in section 64. The Board wrote at page 398:

"To what extent can an employer communicate with its employees during the negotiating process? The scheme of the Act contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in its bargaining unit. The exclusivity of the unions [sic] bargaining rights is expressly protected by section 59, [now 67] which reads: ...

This section prohibits employers from bargaining directly with employees represented by a bargaining agent, and rival unions from bargaining on behalf of such employees.

The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent."

27. In *The Citizen*, [1979] OLRB Rep. Mar. 177; [1979] 2 Can LRBR 251, the Board also reviewed the propriety of employer communication in the context of a long-established collective bargaining relationship at 201-202:

"Counsel's complaint about *The Citizen's* statements of July 19th, and the statements contained in its July 24th offer, raise again the issue of the propriety of an employer communicating directly with its employees during the course of negotiations. The question of the extent to which an employer may engage in such communications was fully canvassed by the Board in *A. N. Shaw* (*supra*). In that case the Board stated that although employers must be circumspect when communicating with their employees, especially during negotiations, not all communications between employers and employees are prohibited by the Act. Section 56 [now 64], prohibiting employer interference with the formation, selection or administration of a trade union, or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats or undue influence'. It is only when communications between employer and employees go beyond the bounds of legitimate freedom of expression and encroach upon the union's exclusive right to bargain on behalf of its employees that they become illegal. Such communications become illegal only when they represent, 'in reality', an

attempt to bargain directly with employees. Direct bargaining with employees is expressly prohibited by section 59 [now 67] of the Act.

In deciding whether an employer's communications to its employees can in reality be characterized as an attempt to bargain directly with them, the Board examines not only the nature of the particular communications complained of, but also the particular bargaining context in which those communications occur. Of particular importance is the timing of the communications, i.e., whether they occur early in the negotiations or late.

By contrast with the situation in *A. N. Shaw*, the communications complained of here were not issued until after the parties had engaged in discussion of all issues in dispute. They did not occur until almost two months from the beginning of negotiations, and until the employer had committed itself to presenting to the other unions a proposal for settlement.

By contrast also with the situation in *Shaw*, the communications here do appear as an attempt by the employer to explain its bargaining position and as an attempt to set the record straight - by dispelling the notion that its objective in bargaining was to isolate the Guild. Moreover, the employer did not, here, as it did in *Shaw*, take it upon itself to disparage the union's proposals or its bargaining committee. Indeed, any disparagement of proposals and committees appears to have been undertaken by the union. The Citizen did express its concerns about the 'climate of confrontation' which it saw developing, as well as it [sic] resolve not to compromise on what it perceived as its right to run its newspaper. But in the instant context those expressions fall well within the protection afforded to employers by section 56.

Nor should the employer's statements have been regarded by employees as disparaging either their union or its proposals. As stated at the outset the parties have a long-standing bargaining relationship and one which The Citizen cannot hope, in the foreseeable future, to end. As noted, the preamble to The Citizen's proposal to the Guild concluded with a pledge to live up to the new agreement and a wish for better relations in the future. In its proposal for settlement of 1976, The Citizen stated that relations with the Pressmen had not been good. In its 1978 proposal, The Citizen expressed the view that those relations had improved considerably."

See also *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609.

28. The Board in *Globe Spring & Cushion*, [1982] OLRB Rep. Sept. 1303 found that employer communication violated the *Labour Relations Act* when it wrote at 1312:

"In the present case it cannot be said that management was merely attempting to explain its bargaining position to the employees, to set the record straight by clearing up a perceived misunderstanding on the part of employees, or to otherwise lawfully exercise its right of freedom of speech. The employee initiated discussions became, through the reactions of management, a bargaining session at which proposals and counterproposals were exchanged on a number of significant issues on June 14th. Although management met with the Union later that day, it met directly with the group of bargaining unit employees again on June 15th, and arranged for an informal employee 'vote' to be taken concerning Globe's proposal on the following day.

While Malcolm Marcus may have initially advised the employees on June 14th that Globe could only bargain with the Union which was their legal bargaining agent, it is apparent that neither he nor his father adhered to that position. By bargaining directly with employees, management sought to weaken the Union's bargaining strength by obtaining a commitment from individual bargaining unit employees to support particular settlement proposals, in the formulation of which they had been directly involved. While the initial approach was made by a group of employees who were concerned about the lack of progress in negotiations between the Union and Globe, management improperly utilized the overture as a basis for engaging in illegal direct negotiations with bargaining.

Management's direct bargaining with those employees contravened not only sections 64 and 67 of the Act, but also section 15. A very important function of the bargaining duty contained in that provision is reinforcement of an employer's obligation to recognize a trade union selected by employees as their bargaining agent (see, *DeVilbiss (Canada) Limited*, *supra*, and the

authorities referred to in that decision). Attempts by an employer to bargain directly with his employees undermine that obligation and, therefore, are antithetical to good faith collective bargaining and the duty to make every reasonable effort to make a collective agreement. Although cases in which section 15 is called upon to play that reinforcing role generally occur in 'first agreement' situations, they can also arise in the context of negotiations for renewal of a collective agreement."

29. See also *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453, 14 Can LRBR (NS) 1 where the Board wrote at 474:

"... As with s.15, the purpose of s.67(1) and one of the purposes of s.64 is to reinforce both the obligation to recognize the trade union's bargaining rights and the prohibition against the use of economic power to undermine those or any other statutory rights associated with collective bargaining. As the language of s.64 reflects, these purposes can be achieved without enjoining all employer communication with employees. Nevertheless, any assessment of the scope of the freedom of expression reserved to employers by s.64 must be sensitive to the labour relations context in which it is made and must strike a balance between that freedom and the freedom to associate which these and other provisions of the Act are intended to protect: (see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) at 617). The employer's freedom to communicate with employees cannot be used to undermine the trade union's bargaining role: *Radio Shack*, *supra*, at para. 75 and *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393 at para. 18.

In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect: *A. N. Shaw Restoration Ltd.* at paras. 19 to 22, and *The Citizen*, [1979] OLRB Rep. Mar. 177 at paras. 57 to 64; and see *Fruehauf Trailer Co. of Canada Ltd.*, [1975] OLRB Rep. Jan. 77; *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Globe and Mail*, [1982] OLRB Rep. Feb. 189."

30. Mr. Bryant's view that only the Guild should be advising employees about the bargaining taking place with the Toronto Star was similar to the position taken by the union in *Canadian Pacific Airlines* (1985), 10 Can LRBR (NS) 62. In that case, the Canada Labour Relations Board wrote at page 82:

"The proposition advanced by Mr. Keras that the union should be the only medium of communication to employees of company and union positions in collective bargaining was not mentioned or pursued by union counsel in argument. In any event, it could not stand up in the light of the realities of employer union relations and collective bargaining and in the face of the jurisprudence of this and other boards that employers may communicate directly to employees within limits. The question for this Board to decide is whether in this case those limits were exceeded. To do so, we have to examine the context of the communications, the communications themselves and whether they could reasonably be expected to have a detrimental effect on the interests of the union and its members in terms contrary to s. 184(1)(a)."

and later at page 84:

"Employer 'interference' with the administration of a union or the representation of employees by a trade union occurs where that which the employer does constitutes meddling in things that are really none of his business, to the detriment of the union. In this case, the process of collective bargaining, the making of a collective agreement, the possibility of a strike, are all matters in which the employer has in theory just as much at stake as the union and the employees. To communicate accurately about his position in connection with things that are crucial to him

without undermining the authority of the union as the exclusive bargaining agent for the employees is not interference as it was contemplated by the framers of s. 184(1)(a)."

31. A similar view was expressed by the Saskatchewan Labour Relations Board in *Canada Safeway*, (1985), 11 Can LRBR (NS) 68 at page 81:

"The Board has held that employers may communicate with their employees on matters being collectively bargained so long as the employer is not in reality attempting to circumvent the union as their exclusive bargaining agent and so long as the communications would not likely be intimidative, coercive or threatening to an employee of average intelligence. An employer does not bargain directly with his employees, or fail to negotiate in good faith with the union, simply because he informs employees of his version of negotiations"

32. In *Saskatchewan Liquor Board*, 85 CLLC ¶16,029, the Saskatchewan Labour Relations Board found a violation of the *Trade Union Act* because the employer's communication were found in reality to be attempts at bargaining directly with employees. The Board in that case wrote at page 14,203:

"The Board cannot attempt to precisely define the limits of an employer's right to communicate with its employees in a way that can be easily applied to every situation. Each case obviously depends on its own facts. Suffice it to say that an employer fails to bargain in good faith and abuses his right to communicate with his employees if his communications become a substitute for a continuing attempt to conclude a collective agreement at the bargaining table with representatives of the union.

The volume, frequency and timing of the communications in this case were such that in the Board's opinion the real forum of debate and negotiation was at times transferred by the employer from the bargaining table to the workplace. The end result was that on those occasions the employer complied in form only with its obligation to carry on negotiations with representatives elected or appointed by the union."

33. The communications by the Toronto Star in this case were undertaken only after the Toronto Star's position had been given to the Guild across the bargaining table. The communications were carried out in circumstances where there has existed a long-standing collective bargaining relationship, where both employer and union communications have taken place during the latter stages of bargaining, where the Guild had already engaged in extensive communications and where there was a mutual expectation that such communication would again take place. The Toronto Star's communications were, but for one exception, entirely accurate and did not, in our view, seek to disparage or undermine the Guild. It seems to us that the Toronto Star was expressing its view on the progress of bargaining, the issues remaining in dispute and its position on those issues. While the timing of the Toronto Star's second Management Report, issued the morning after the mediation meeting of October 23, 1985 and before the Guild had had a reasonable opportunity to disclose to its members the results of that meeting, does cause us some concern, nevertheless, we are persuaded that the communications in their entirety neither explicitly nor implicitly suggested to the employees that they could negotiate directly with the Toronto Star, nor did the communications in any way seek to have the employees reject the Guild as their bargaining agent. Rather, the communications clearly indicated that the Toronto Star was negotiating with the Guild.

34. Since the Act expressly authorizes employers to communicate with employees, and at the same time protects the right of the employees' bargaining agent to exclusively represent employees in collective bargaining, a balance of those two often competing rights must be established. An employer clearly cannot circumvent the employees' bargaining agent by negotiating directly with its employees under the guise of communicating with employees. Nevertheless, an employer is free to explain to its employees its position with respect to the collective bargaining

negotiations after having engaged in collective bargaining with the employees' bargaining agent on the matters that are the subject of the communications. The nature, timing and circumstances of such communications must all be assessed to determine whether what appears to be permissible is actually improper. In our opinion, when making that assessment, the Board's comments in *Fruehauf Trailer Company of Canada Ltd.*, [1975] OLRB Rep. Jan. 77 at 83 are certainly relevant:

"As a general matter the Board must be very careful not to insert itself, without hesitation, into the bargaining process as a censor of the communications between parties engaged in this often emotionally charged exercise. A more intrusive approach would provoke disruptive litigation over what is essentially unavoidable human nature. Furthermore we believe that reasonable employees and diligent trade unions have little difficulty evaluating and responding to most of the isolated direct communications that may occur during collective bargaining."

35. In our opinion, the Toronto Star's communications with its employees did not violate sections 64 and 67 of the *Labour Relations Act* and were well within the bounds of permissible employer communication with employees during collective bargaining that is explicitly permitted by section 64 of the Act. We are also satisfied that the Toronto Star carried on collective bargaining with the Guild, and did not, through its communications, attempt to negotiate with its employees directly.

36. For the foregoing reasons, this complaint is hereby dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1871-87-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Tomic Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3149-87-R: Ontario Public Service Employees Union (Applicant) v. Central Toronto Youth Services (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, Secretary to the Executive Director, Administrative Director, Director of Program Services, Director of the Community Activity Awareness Program, Program Manager of the New Outlook Program, Medical Consultant, Social Work Consultant (Consultant at Large), Supervisor of the Assessment Consultation and Treatment Team, Contract Worker Co-ordinator, Contract Workers and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

3201-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Dowcon Sheet Metal Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3296-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Carlyle Residences Inc.; 620727 Ontario Ltd., c.o.b. as Four G's Construction; The Carlyle Residences (II) Inc., and Heritage North Inc. (Respondents)

Unit: "all construction labourers in the employ of 620727 Ontario Limited, carrying on business as Four G's Construction, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 620727 Ontario Limited carrying on business as Four G's Construction, in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0361-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Columbia Lumber Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto in its Warehouse Mill Division, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, retail stores staff and students employed during the school vacation period” (108 employees in unit) (*Having regard to the agreement of the parties*)

0433-88-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Pavage et Bétonnière St-Eustache Ltée (c.o.b. as Mathers Concrete) (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

0585-88-R: United Steelworkers of America (Applicant) v. 4500 Taxi Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Welland, save and except manager and dispatcher, persons above the rank of manager and dispatcher, office, clerical and sales staff, brokers and persons regularly employed for not more than 24 hours per week” (39 employees in unit) (*Having regard to the agreement of the parties*)

0596-88-R: Labourers’ International Union of North America, Local 493 (Applicant) v. McEndon Ltd. (Respondent)

Unit: “all construction labourers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry, excluding the industrial commercial and institutional sector, within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman” (18 employees in unit)

0653-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Land Excavating & Grading Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Caledon, save and except foremen, persons above the rank of foreman, office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

0684-88-R: United Steelworkers of America (Applicant) v. Quigley Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at the Algoma Steel Corporation Limited in Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

0698-88-R: United Steelworkers of America (Applicant) v. Huron Alloys Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Clearwater, save and except forepersons, persons above the rank of foreperson, office and technical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0712-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at its warehouse operations in Brampton, save and except supervisors, persons above the rank of supervisor, office, and clerical staff and co-ordinators” (28 employees in unit) (*Having regard to the agreement of the parties*)

0782-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Applicant) v. Patrick L. Roberts Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

0817-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gottardo Contracting (1980) Inc. and Gottcon Contractors Ltd. (Respondents)

Unit: “all employees of Gottardo engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

0823-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Image Painters L.M. Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

0851-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Middlesex County Board of Education (Respondent)

Unit: “all employees of the respondent in Middlesex County employed as psychologists, psychometrists, speech language therapists and attendance counsellors, save and except supervisors, persons above the rank of supervisor” (10 employees in unit) (*Having regard to the agreement of the parties*)

0853-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Cornwall Machine & Welding Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Cornwall, save and except foremen, persons above the rank of foreman, and office, clerical, technical and sales staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

0870-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Freightmaster Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dependent contractors, dispatchers, office and sales staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

0876-88-R: Bertelsmann Music Group Canada Inc., Employees Association (Applicant) v. BMG Music Canada Inc. (Respondent)

Unit: “all employees of the respondent at 2245 Markham Road, Toronto, save and except supervisors, persons above the rank of supervisor, accountant, outside sales and promotion staff, field merchandisers, secre-

tary to the President, secretaries to Managers reporting directly to the President, and students employed during the school vacation period” (32 employees in unit)

0893-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lake Ontario Cement Ltd. (Respondent)

Unit: “all employees of the respondent at its KVN Concrete Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of July 13, 1988” (11 employees in unit) (*Having regard to the agreement of the parties*)

0895-88-R: Service Employees Union, Local 183 (Applicant) v. February 11 Interactive Publishing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent working in and out of the Village of Stirling, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period working in and out of the Village of Stirling, save and except supervisors and those above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

0896-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Beaver Cook & Leitch Ontario Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0913-88-R: Ontario Nurses’ Association (Applicant) v. Easton’s Manor Nursing Home 607498 Ontario Inc. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Woford, save and except Director of Resident Care and persons above the rank of Director of Resident Care” (7 employees in unit) (*Having regard to the agreement of the parties*)

0928-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Philips Air Distribution Ltd. (Respondent)

Unit: “all employees of the respondent at its Lau Division and Canada Fans Division in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, office and sales staff” (78 employees in unit) (*Having regard to the agreement of the parties*)

0936-88-R: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 12, Kitchener, Ontario (Applicant) v. Robertson-Yates Corporation Ltd. (Respondent) v. Resilient Floorworkers, United Brotherhood of Carpenters & Joiners of America, Local 2695 (Intervener #1) v. Operative Plasters & Cement Masons International Association of the United States & Canada, Local 598 (Intervener #2)

Unit: “all journeymen and apprentice marble, tile and terrazzo mechanics and their helpers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Prov-

ince of Ontario save and except non-working foremen and persons above the rank of non-working foreman and all journeymen and apprentice marble, tile and terrazzo mechanics and their helpers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the County of Wellington save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0937-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Balderson Cheese Company (Respondent)

Unit #1: “all employees of the respondent at Balderson, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and retail store staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (20 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent at Balderson regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and retail store staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

0939-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Cardeen Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries and that portion of the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0959-88-R: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Cote Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the geographic Townships of Elizabethtown, Augusta, and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0961-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lemiro Inc. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0988-88-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Corporation of the Township of Chatham (Respondent)

Unit: “all employees of the respondent in the Township of Chatham, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

1001-88-R: Labourers’ International Union of North America, Local 247 (Applicant) v. Fairfield Management Ltd. (Respondent)

Unit: “all employees of the respondent in Belleville, save and except supervisors, persons above the rank of

supervisor, rental agents, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

1002-88-R: United Brotherhood of Carpenters & Joiners of America Drywall Acoustic, Lathing & Insulation - Local 675 (Applicant) v. Rubycon Interior (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

1032-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Hawk Contracting Alliston Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1099-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cardeen Construction Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1104-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Jonroy Equipment Rentals Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1130-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. O.P.A.C. Mechanical Inc. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1131-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Sun Plumbing & Mechanical Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1132-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Clima Mechanical Contractors Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0212-88-R, 0213-88-R: Office & Professional Employees International Union (Applicant) v. Twin Oak Industrial Credit Union Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Brampton, save and except assistant managers, persons above the rank of assistant manager, and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	4
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	2
Number of segregated ballots cast by persons whose names appear on voters’ list	1
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

0512-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lafarge Canada Inc. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL:CIO:CLC - Office Workers D368, Woodstock, Ontario (Intervener)

Unit: “all employees of the respondent in its general offices, shipping office and stores at its plant in the Township of Zorra, in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, Assistant Office Manager and persons above the rank of Assistant Office Manager” (10 employees in unit)

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	9
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	8
Number of segregated ballots cast by persons whose names appear on voters’ list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	1

0566-88-R: United Steelworkers of America (Applicant) v. St. Marys Cement Corporation (Respondent) v. Cement Lime, Gypsum & Allied Workers Division International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Intervener)

Unit: "all employees of the respondent in St. Marys in its St. Marys Cement Company Division, save and except forepersons, persons above the rank of foreperson, supervisors, watchmen, office staff and chemists" (144 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	144
Number of persons who cast ballots	111
Number of ballots marked in favour of applicant	109
Number of ballots marked in favour of intervener	2

0591-88-R: Canadian Union of Public Employees (Applicant) v. Ontario Cancer Treatment & Research Foundation - Ottawa Regional Cancer Centre (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, career scientists, physicists, students physicists, paramedical employees, secretary tot he Director, secretary to the Division Director, secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Business Manager, Personnel Officer, persons in research positions funded by special research grants, persons regularly employed for not more than 24 hours per week and and employees for whom any trade union held bargaining rights as of June 3, 1988" (107 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	89
Number of persons who cast ballots	70
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	65
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	26
Ballots segregated and not counted	2

0770-88-R: International Union of Operating Engineers, Local 796 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit #1: "all mechanical maintenance employees of the respondent at the Aetna Canada Centre Building in the Municipality of Metropolitan Toronto engaged in maintenance services and plant operations, save and except the assistant superintendent, persons above the rank of assistant superintendent, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

Unit #2: (see *Bargaining Agents Dismissed Subsequent to a Pre-Hearing Vote*)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3492-87-R: United Steelworkers of America (Applicant) v. D. & A. Woodworking Ltd. (Respondent) v. International Union of Allied, Novelty & Production Workers, Local 905 (Intervener)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period" (82 employees in unit)

Number of names of persons on list as originally prepared by employer	82
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Number of persons who cast ballots	67
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	63
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	53
Number of ballots marked in favour of intervener	6
Number of ballots marked in favour of no union	5
Ballots segregated and not counted	2

Applications for Certification Dismissed Without Vote

1181-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Strongland Construction Ltd. (Respondent) (1 employee in unit)

0436-88-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Canadian Corporate Management Ltd. (Respondent) (13 employees in unit)

0816-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. Future Building Materials Ltd. (Respondent) (15 employees in unit)

0828-88-R: United Steelworkers of America (Applicant) v. Atlas Door Co. Ltd. (Respondent) (18 employees in unit)

0884-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Malfara & Sons Excavating & Contracting Inc. (Respondent) (12 employees in unit)

0903-88-R: University of Guelph Police Association (Applicant) v. University of Guelph (Respondent) (9 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2878-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all occasional teachers employed by the respondent in its secondary panel" (777 employees in unit)

Number of names of persons on revised voters' list	832
Number of persons who cast ballots	228
Number of ballots marked in favour of applicant	112
Number of ballots marked in favour of intervener	116
Ballots segregated and not counted	28

0437-88-R: IWA - Canada (Applicant) v. Field Lumber (1956) Ltd., L. Brun Co. Ltd., R. Fryer Forest Products Ltd. (Respondent)

Unit #1: "all employees of Field Lumber (1956) Limited and L. Brun Co. Limited in their sawmills, planing mills, and yards in the Township of Field and Badgerow, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period" (51 employees in unit)

Number of names of persons on revised voters' list	104
Number of persons who cast ballots	90
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	49

0637-88-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Regal Greetings & Gifts (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period" (47 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	23

0713-88-R: IWA - Canada (Applicant) v. K. & P. Woodworking Specialists Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, installers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit)

Number of names of persons on list as originally prepared by employer	41
Number of persons who cast ballots	37
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	36
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	27
Ballots segregated and not counted	1

0770-88-R: International Union of Operating Engineers, Local 796 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*)

Unit #2: "all employees of the respondent at the Aetna Canada Centre Building in the Municipality of Metropolitan Toronto, save and except the assistant superintendent, persons above the rank of assistant superintendent, office staff, security staff, parking attendants, mechanical maintenance employees, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**2975-87-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. P. & M. Electric (1982) Ltd. (Respondent)**

Unit: "all journeymen electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in Board Area No. 8, save and except non-working foremen and persons above the rank of non-working foreman" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	33
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	31
Number of segregated ballots cast by persons whose names appear on voters' list	2

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	22
Ballots segregated and not counted	2

0372-88-R: United Food & Commercial Workers International Union (Applicant) v. Prime Poultry Products (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except office staff, forepersons and persons above the rank of foreperson" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	36

0404-88-R: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. The Glass Shop a Division of AFG Glass Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all glaziers and glaziers apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers apprentices in the employ of the respondent in all other sectors in Board Area 8, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2

0538-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. The Griffith Laboratories Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, technical staff and those persons regularly employed for not more than 24 hours per week" (278 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	237
Number of persons who cast ballots	237
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	90
Number of ballots marked against applicant	144

0704-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Gerry Lees Building Materials Ltd. c.o.b. as Beaver Lumber (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Midland, save and except forepersons, persons above the rank of foreperson, office and clerical staff, students employed during the school vacation period and persons employed through a co-operative education program" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	7

0909-88-R: International Beverage Dispensers' & Bartenders' Union, Local 280 of The Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. 774395 Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed as full-time and part-time tap men, bartenders, beverage waiters-waitresses (including beverage waiters-waitress

who operate automatic dispensing equipment), bar persons, and bus persons, save and except supervisors and persons above the rank of supervisor” (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of segregated ballots cast by persons whose names appear on voters' list	3
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	12
Ballots segregated and not counted	3

Applications for Certification Withdrawn

3365-87-R: Sue K. Parkinson (Applicant) v. United Food & Commercial Workers International Union, Local 175 AFL:CIO:CLC (Respondent)

0227-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 584 551 Ontario Ltd. (Respondent)

0365-88-R: Canadian Union of Public Employees (Applicant) v. Georgetown & District Memorial Hospital (Respondent)

0829-88-R: Canadian Union of Public Employees (Applicant) v. Town of Gananoque (Respondent)

0835-88-R: International Brotherhood of Electrical Workers, Local #1730 (Applicant) v. The Corporation of the Town of Dryden (Respondent)

0862-88-R: Hotel Employees & Restaurant Employees Union, Local 75 (Applicant) v. Skyline Triumph Hotel (Respondent)

0868-88-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C (Applicant) v. Jean Tweed Treatment Centre (Respondent)

0971-88-R: United Food & Commercial Workers Union, Local 175 (Applicant) v. Canada Safeway Ltd. (Respondent) v. Group of Employees (Objectors)

1007-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Merrick Homes Inc., Merrick Homes (Oakville) Inc., Merrick Homes - Oakville (Respondents)

1041-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Allan Candy Ltd. (Respondent)

1058-88-R: Slimline Pipe Association Committee (Applicant) v. Slimline Pipe Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0289-87-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Masonry Contractors' Association of Toronto Inc., Krest Masonry Contracting Ltd. and 654812 Ontario Ltd., c.o.b. as Canada Contracting (Respondents) (*Granted*)

1591-87-R: 674659 Ontario Ltd. and 599872 Ontario Inc. (Applicants) v. United Food & Commercial Workers Union, Local 1000A and Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Respondents) (*Granted*)

3157-87-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Metro Century

Construction Ltd., Chartex Construction Ltd., Wonsch Construction Company Ltd., Mady General Contracting Ltd., and Mady-Wonsch Construction Ltd. (Respondents) (*Withdrawn*)

0224-88-R: International Association of Bridge, Structural & Ornamental Ironworkers Shopmen's Local No. 834 (Applicant) v. Lackie Bros. Ltd., Lackie Transportation Services Ltd., Lackie Industrial Contractors Ltd. (Respondents) (*Granted*)

0506-88-R: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicants) v. Teaphilus Masonry Inc., Merkev Masonry & General Contracting Inc., and Merkev Masonry Inc. (Respondents) (*Granted*)

0438-88-R: IWA - Canada (Applicant) v. R. Fryer Forest Products Ltd., L. Brun Co. Ltd., Field Lumber (1956) Ltd. (Respondents) (*Granted*)

0949-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 584551 Ontario Ltd. & Metro Carpentry Ltd. (Respondent) (*Withdrawn*)

1000-88-R: International Ladies Garment Workers Union (Applicant) v. Phil Carry Sportswear Ltd. and G.H.S. Holding Ltd. c.o.b. as C.Q.C. Manufacturing (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0289-87-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Masonry Contractors' Association of Toronto Inc., Krest Masonry Contracting Ltd. and 654812 Ontario Ltd. c.o.b. as Canada Contracting (Respondents) (*Granted*)

1564-87-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. 674659 Ontario Ltd. (Respondent) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 414 (Intervener) (*Granted*)

3137-87-R: United Food & Commercial Workers International Union, Local 617P (Applicant) v. Crown Packers & Realities Ltd., Crown Meat Packers Ltd., Crown Dressed Meats Inc. (Respondents) (*Dismissed*)

3157-87-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Metro Century Construction Ltd., Chartex Construction Ltd., Wonsch Construction Company Ltd., Mady General Contracting Ltd., and Mady-Wonsch Construction Ltd. (Respondents) (*Withdrawn*)

3238-87-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Pavage et Bétonnière St-Eustache Ltée (c.o.b. as Mathers Concrete) (Respondent) (*Withdrawn*)

0045-88-R: Hotels, Clubs, Restaurants & Tavern Employees Union, Local 261 (Applicant) v. skyline Ottawa (1980) Ltd. and 709212 Ontario Ltd. c.o.b. as Master's Brew Pub & Brasserie (Respondents) (*Dismissed*)

0163-88-R: International Ladies' Garment Workers' Union (Applicant) v. Antoinette Fashions Ltd. and Calla Manufacturing Ltd. (Respondents) (*Withdrawn*)

0164-88-R: International Ladies Garment Workers Union (Applicant) v. G. H. Sportswear Manufacturing Ltd. and G. H. Imported Merchandise & Sales Ltd. c.o.b. as The G. H. Group (Respondents) (*Withdrawn*)

0169-88-R: Architectural School Products Ltd. (Applicant) v. A.S.P. Access Floors Inc., and United Steelworkers of America, Local 8950 (Respondents) (*Granted*)

0224-88-R: International Association of Bridge, Structural & Ornamental Ironworkers Shopmen's Local No. 834 (Applicant) v. Lackie Bros. Ltd., Lackie Transportation Services Ltd., Lackie Industrial Contractors Ltd. (Respondents) (*Granted*)

0506-88-R: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicants) v. Teaphilus Masonry Inc., Merkev Masonry & General Contracting Inc., and Merkev Masonry Inc. (Respondents) (*Granted*)

0793-88-R: Abraham Neudorf oa Neudorf Stamping Company (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

0814-88-R: The Ontario Public Service Employees Union (Applicant) v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Tarandus Associates Ltd. (Respondent) (*Withdrawn*)

0815-88-R: The Ontario Public Service Employees Union (Applicant) v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Charmaine's Janitorial Services (Respondent) (*Granted*)

0848-88-R: The Ontario Public Service Employees Union (Applicant) v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Moose Creek Forestry Company (Respondent) (*Granted*)

0849-88-R: Ontario Public Service Employees Union (Applicant) v. Gullwing Forestry Ltd. (Respondent) (*Granted*)

0850-88-R: The Ontario Public Service Employees Union (Applicant) v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources and Harold Lucasavitch (Respondent) (*Dismissed*)

0950-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 584551 Ontario Ltd. & Metro Carpentry Ltd. (Respondent) (*Withdrawn*)

1000-88-R: International Ladies Garment Workers Union (Applicant) v. Phil Carry Sportswear Ltd. and G.H.S. Holding Ltd. c.o.b. as C.Q.C. Manufacturing (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0830-87-R: John Campbell (Applicant) v. International Brotherhood of Electrical Workers, Local 1590 (Respondent) v. Cable Tech Co. Ltd. (Intervener)

Unit: "all employees of Cable Tech Wire Company Limited in the Town of Whitchurch-Stouffville, save and except foremen, persons above the rank of foreman, office, technical and sales staff and students employed during the school vacation period" (138 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	158
Number of persons who cast ballots	135
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	134
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	68
Number of ballots marked against respondent	66

2427-87-R: Larrie Rule (Applicant) v. Teamsters Union, Local 419 (Respondent) v. Nedco, Division of Westburne Industrial Enterprises Ltd. (Intervener) v. Group of Employees (Objectors) (44 employees in unit) (*Dismissed*)

3365-87-R: Sue Parkinson (Applicant) v. United Food & Commercial Workers International Union, Local 175 AFL:CIO:CLC (Respondent) (*Withdrawn*)

3494-87-R: Van Hoa Quach, on his own behalf and on behalf of a group of employees of Nortec Airconditioning Industries Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 2228 (Respondent) (*Withdrawn*)

3500-87-R: Monica Cremona (Applicant) v. Service Employees International Union, Local 204 (Respondent) (9 employees in unit) (*Granted*)

3512-87-R: Karen Brain (Applicant) v. Energy & Chemical Workers Union, Local 848 (Respondent)

Unit: "all Full time and Part time employees of E.C.W.U. Lounge - 914 Club, Energy and Chemical Workers Union Local 914 in its Sarnia operation except those covered by Local 220 London and District Service Workers Union and the Lounge Manager" (> employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	1

3541-87-R: Michel Paquette (Applicant) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Respondent) (*Withdrawn*)

3568-87-R: Sue Quiring and Thelma Dewinter (Applicant) v. United Food & Commercial Workers International Union, AFL, CIO-CLC (Respondent) (*Withdrawn*)

3581-87-R: Franklin Louis Gazdig (Applicant) v. International Brotherhood of Electrical Workers, Local 120 (Respondent) v. Franklin Electro Control Company Ltd. (Intervene) (*Withdrawn*)

0056-88-R: Hillier John Horrocks (Applicant) v. International Brotherhood of Painters & Allied Trades, Local 114 (Respondent) v. Wm. H. Earl Painting & Decorating Ltd. (Intervener)

Unit: "all persons employed by the intervener as painters and painters' apprentices in the industrial, commercial and institutional (ICI) sector of the construction industry in the Province of Ontario" (1 employee in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

0189-88-R: Michael Ukroenz (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent) v. Jack W. Harper Construction Ltd. (Intervener)

Unit: "all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

0210-88-R: William Stephenson (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener)

Unit: "all employees of the company at Strathroy, Ontario, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more

than 24 hours per week and students employed during the school vacation period” (28 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	22
Number of ballots, excluding segregated ballots cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	14
Ballots segregated and not counted	1

0244-88-R: Richard Nolan (Applicant) v. Labourers' International Union of North America, Local 1081 and Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. E. R. Masonry Ltd. (Intervener)

Unit: “all construction labourers, including masons or bricklayers tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, and all other construction employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the respondent has bargaining rights, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

0548-88-R: D. Shane O'Brien, Helene Brunelle, Susan Ford, Thomas Robinson, Thomas Flood (Applicants) v. Office & Professional Employees' International Union (Respondent) (5 employees in unit) (*Granted*)

0687-88-R: Shirley Winter Local 105 (Applicant) v. Independent Canadian Steelworkers' Union (Respondent) v. VS Services Ltd. (Intervener) (*Withdrawn*)

0796-88-R: Thomas Alan McKercher (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) v. Sniderman Radio Sales & Services Ltd. (Intervener)

Unit: “all employees of the respondent at its corporated owned and operated stores in Metropolitan Toronto, save and except buyers, temporary employees, assistant managers and those above the rank of assistant manager” (56 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	54
Number of persons who cast ballots	37
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	31
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	28
Ballots segregated and not counted	6

0805-88-R: Kimberley Miller (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Passas Restaurants Ltd. c/o Bentley's Seafood Restaurant (Intervener) (41 employees in unit) (*Granted*)

0833-88-R: W. R. Harrison (Applicant) v. United Steelworkers of America (Respondent) (2 employees in unit) (*Granted*)

0834-88-R: Daniel Gagnon (Applicant) v. Toronto Printing Pressmen & Assistants Union, Local No. 10 (Respondent) v. Smith Folding Cartons Ltd. (Intervener) (23 employees in unit) (*Granted*)

0859-88-R: Gaetano Oliverio (Applicant) v. United Steelworkers of America (Respondent) v. Toronto Chromium Plating Ltd. (Intervener) (15 employees in unit) (*Granted*)

0922-88-R: Joseph Siracusa (Applicant) v. United Food & Commercial Workers International Union (Respondent) v. Canada Dry Bottling Company Ltd. (Intervener) (10 employees in unit) (*Granted*)

1102-88-R: Plibrico (Canada) Ltd. (Applicant) v. International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Respondent) (7 employees in unit) (*Dismissed*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0764-88-M: Knob Hill Farms Ltd. (Employer) v. United Food & Commercial Workers, Local 175 (Trade Union) v. Group of Employees (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1205-88-U; 1206-88-U; 1207-88-U: The Residential Roofing Contractors Association of Metropolitan Toronto on its own behalf and on behalf of each of its individual members as listed in Schedule I (Applicant) v. The Canadian Shinglers Association Inc. and Wayne Rogers, Pete Cowie, Robert Shewell, Harold Biso & Steven Wolfreys (Respondents) (*Dismissed*)

1208-88-U; 1209-88-U; 1210-88-U: The Residential Roofing Contractors Association of Metropolitan Toronto on its own behalf and on behalf of each of its individual members as listed in Schedule I (Applicant) v. Dan Germain, Grant Kumagai, Dennis LePage, Steve Smodis, Scott Covin, Sean Vieau, Paul O'Doherty, Franco Bisioni, Chris Weidmar, Terry West, Robert Milner, Chris St. Clair, Gilbert Daponte, Terry Higgins, Ron French, Jack Morrisette, Trent Knudsen, Ken Gies, Chris Murray, Ted Poulton, Duardo Arrude, Duardo Manuel Arrude, James Taylor, Pierre LeBlond, Harold Biso (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1205-88-U; 1206-88-U; 1207-88-U: The Residential Roofing Contractors Association of Metropolitan Toronto on its own behalf and on behalf of each of its individual members as listed in Schedule I (Applicant) v. The Canadian Shinglers Association Inc. and Wayne Rogers, Pete Cowie, Robert Shewell, Harold Biso & Steven Wolfreys (Respondents) (*Dismissed*)

1208-88-U; 1209-88-U; 1210-88-U: The Residential Roofing Contractors Association of Metropolitan Toronto on its own behalf and on behalf of each of its individual members as listed in Schedule I (Applicant) v. Dan Germain, Grant Kumagai, Dennis LePage, Steve Smodis, Scott Covin, Sean Vieau, Paul O'Doherty, Franco Bisioni, Chris Weidmar, Terry West, Robert Milner, Chris St. Clair, Gilbert Daponte, Terry Higgins, Ron French, Jack Morrisette, Trent Knudsen, Ken Gies, Chris Murray, Ted Poulton, Duardo Arrude, Duardo Manuel Arrude, James Taylor, Pierre LeBlond, Harold Biso (Respondents) (*Withdrawn*)

1232-88-U: Ledcor Industries Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and Bill Weatherup (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2795-84-U: United Steelworkers of America (Complainant) v. Shaw-Almex Industries Ltd. (Respondent) (*Dismissed*)

3138-86-U: Glass, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC (Complainant) v. Kohler Ltd. (Respondent) (*Granted*)

1896-87-U: Resilient Floorworkers, Local 2965 (United Brotherhood of Carpenters & Joiners of America) (Complainant) v. Zeppa Tile Inc. (Respondent) (*Dismissed*)

2157-87-U: National Elevator & Escalator Association and its member company, Montgomery Kone Elevator Co. Ltd. (Complainants) v. Joseph Kennedy on his own behalf and on behalf of Local 96 of The International Union of Elevator Constructors and on behalf of The International Union of Elevator Constructors (Respondent) (*Withdrawn*)

2342-87-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. Landmark Motor Inn (Respondent) (*Dismissed*)

2689-87-U, 2692-87-U, 2693-87-U, 2694-87-U, 2695-87-U, 2696-87-U: Parmjit Singh, Igbal Jit Singh Mann, Kamaljit Singh, Balbir Tumber, Parmjeet Rai and Gian Gill (Complainants) v. International Leather Goods, Plastic & Novelty Workers Union and Plax Inc. (Respondents) (*Withdrawn*)

2819-87-U: Toronto Printing Pressmen & Assistants' Union No. 10 (Complainant) v. Hartley Gibson Company Ltd. (Respondent) (*Withdrawn*)

2820-87-U: United Steelworkers of America (Complainant) v. Canadian Feed Screws Manufacturing Ltd. and Chris Valsilev (Respondents) (*Granted*)

2828-87-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Gerry Lowrey Ltd. (Respondent) (*Withdrawn*)

2893-87-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. P. & M. Electric (1982) Ltd. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

2965-87-U: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Complainant) v. Tomic Construction Ltd. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

3136-87-U: United Food & Commercial Workers International Union, Local 617P (Complainant) v. Crown Packers & Realities Ltd., Crown Meat Packers Ltd., Crown Dressed Meats Inc. (Respondents) (*Dismissed*)

3152-87-U: Teamsters Local No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Vesta Cutting Tools Inc., Eugene Levik and R. A. Bentley (Respondents) (*Withdrawn*)

3164-87-U: Nortec Air Conditioning Industries Ltd. (Complainant) v. International Brotherhood of Electrical Workers, Local 2228 (Respondent) v. Van Hoa Quach on his own behalf and on behalf of a group of employees of Nortec Airconditioning Industries Ltd. (Intervener) (*Withdrawn*)

3215-87-U: A Council of Trade Unions (acting as the representative and agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183) (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

3217-87-U: A Council of Trade Unions (acting as the representative and agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183) (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

3239-87-U: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Complainant) v. Pavage et Bétonnière St-Eustache Ltée (c.o.b. as Mathers Concrete) (Respondent) (*Withdrawn*)

3276-87-U: Thomas F. Gaston (Complainant) v. Pioneer Youth Services (Respondent) (*Withdrawn*)

3290-87-U: Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Locals 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

3411-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Sears Canada Inc., and N. Khan, O. Chung, Ron Hinton, Roy Hinton, D. Bellinger, G. Himish, Norman Dunniwood, H. Ackles, B. Smith, R. Atkinson, M. Goddard (Respondents) (*Withdrawn*)

3435-87-U; 3490-87-U: Labourers' International Union of North America, Local 183 (Complainant) v. Carlyle Residences Inc. and Four G's Building Inc. (Respondents) (*Dismissed*)

3498-87-U: Service Employees Union, Local 210 affiliated with Service Employees' International Union, AFL:CIO:CLC (Complainant) v. Central Park Lodges, Windsor, Ontario and Jim Anderson (Respondent) (*Withdrawn*)

0175-88-U: International Association of Bridge, Structural & Ornamental Ironworkers Shopmen's Local No. 834 (Complainant) v. Crips-Atlas Ltd. (Respondent) (*Withdrawn*)

0191-88-U: Labourers' International Union of North America, Local 506 (Complainant) v. Metropolitan Toronto Civic Employees' Union, Local 43, Canadian Union of Public Employees (Respondents) (*Dismissed*)

0228-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Tesc Contracting Ltd. (Respondent) (*Withdrawn*)

0240-88-U: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Colds Book Stores Ltd. (Respondent) (*Dismissed*)

0293-88-U: Service Employees' Union, Local 210 affiliated with Service Employees' International Union, AFL:CIO:CLC (Complainant) v. Central Park Lodges, Windsor, Ontario and Jim Anderson (Respondent) (*Withdrawn*)

0306-88-U: Sudbury Mine Mill & Smelter Workers Union, Local 598 (Complainant) v. Noramco Mining Corporation (Emerald Lake Resources) (Respondent) (*Withdrawn*)

0329-88-U: Harold Walters (Complainant) v. Laundry & Linen Drives & Industrial Workers Union, Teamsters Local 847 (Respondent) v. Goldcrest Furniture Ltd. (Intervener) (*Dismissed*)

0359-88-U; 0519-88-U: United Food & Commercial Workers International Union, Local 175 AFL:CIO:CLC (Complainant) v. Cancoil Thermal Corporation (Respondent) (*Withdrawn*)

0444-88-U: Edith Helmer (formerly Woodard) (Complainant) v. (Chrysler Canada Ltd.) and Canadian Auto-workers (formerly U.A.W.) Local 1090 (Respondents) (*Withdrawn*)

0482-88-U: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. Kitchener - Waterloo Hospital (Respondent) (*Granted*)

0518-88-U; 0540-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Ideal Railings Ltd. (Respondent) (*Withdrawn*)

0625-88-U: Local 307 of the Canadian Brotherhood of Railway Transport & General Workers, on behalf of Jan Watt, member of that Local (Complainant) v. Travelways Ltd. (Respondent) (*Withdrawn*)

0647-88-U: Sandra May Cook (Complainant) v. Idlewyld Manor of Hamilton (Respondent) (*Withdrawn*)

0682-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Zeller's Inc. (Respondent) (*Withdrawn*)

0703-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. The Bay (A Department Store Division of the Hudson's Bay Company) (Respondent) (*Withdrawn*)

0710-88-U: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Chipperfield Trucking Services Ltd. (Respondent) (*Withdrawn*)

0715-88-U: Service Employees Union, Local 183 (Complainant) v. Empress Gardens (Respondent) (*Withdrawn*)

0718-88-U: Larry R. Renaud (Complainant) v. Chrysler Canada and Local 444 (C.A.W.) (Respondent) (*Withdrawn*)

0738-88-U: Sheet Metal Workers' International Association, Local 47 and Gilles Charette (Complainants) v. 99538 Canada Inc. c.o.b. as B.C. Meck, Bernard Carbonneau (Respondents) (*Granted*)

0754-88-U: United Steelworkers of America (Complainant) v. 4500 Taxi Ltd. (Respondent) (*Withdrawn*)

0787-88-U: Mr. Grant A. Hartley (Complainant) v. Ontario Taxi Union, Local 1688 R.W.D.S.U., AFL:CIO:-CLC and It's Business Agent Harry Ghadban (Respondent) (*Withdrawn*)

0818-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. 369150 Ontario Limited, c.o.b. B-4 Equipment Sales (Respondent) (*Withdrawn*)

0822-88-U: Azim Babu Ramji (Complainant) v. Metropolitan Toronto Convention Centre Corporation and Laundry & Linen Drivers & Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondents) (*Withdrawn*)

0830-88-U; 0831-88-U: Office & Professional Employees International Union (Complainant) v. Twin Oak Industrial Credit Union Ltd. (Respondent) (*Withdrawn*)

0838-88-U: United Steelworkers of America (Complainant) v. 4500 Taxi Ltd. (Respondent) (*Withdrawn*)

0839-88-U: United Steelworkers of America (Complainant) v. Huron Alloys Inc. (Respondent) (*Withdrawn*)

0863-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Camaro Enterprises Ltd. (Respondent) (*Withdrawn*)

0890-88-U: United Steelworkers of America (Complainant) v. Quigley Canada Inc. (Respondent) (*Withdrawn*)

0899-88-U: Isa Schaefer (Complainant) v. United Steelworkers of America, Local 14202 and Drug Trading Company Ltd. (Respondents) (*Withdrawn*)

0916-88-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Robert Lowrey and Gerry Lowrey Ltd. (Respondents) (*Withdrawn*)

0931-88-U: Service Employees' International Union, Local 204 (Complainant) v. Glebe Manor (Respondent) (*Withdrawn*)

0962-88-U: Deepcally Baksh (Complainant) v. Electro Procelain Co. Ltd. (Respondent) (*Withdrawn*)

0985-88-U: International Association of Machinists & Aerospace Workers, Local 2332 (Complainant) v. Autofix Ltd. (Ross Auto Body) (Respondent) (*Withdrawn*)

1009-88-U: Conrad Lubitz (Complainant) v. United Food & Commercial Workers International Union (UFCW), Local 175, (Warren Kennedy Acting Business Representative) (Respondent) (*Withdrawn*)

1029-88-U: Stephen Morvay (Complainant) v. Deborah Lavelle & The Ontario Jockey Club (Respondents) (*Dismissed*)

1086-88-U: Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0772-88-M: Inglis Ltd. (Employer) v. The United Steelworkers of America on behalf of its Locals 2900 & 4487 (Trade Union) (*Granted*)

0927-88-M: Goldcrest Furniture Ltd. (Employer) v. Laundry & Linen Drivers & Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

0021-87-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. E. S. Fox Ltd. and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Respondents) (*Withdrawn*)

0792-88-JD: International Association of Bridge, Structural & Ornamental Ironworkers; Ironworkers District Council of Ontario; and International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Complainant) v. Commonwealth Construction Ltd.; Commonwealth Construction Company (1985) Ltd.; Commonwealth Pacific Consultants Ltd.; Ged-Ven Fabricating & Erection Ltd.; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0856-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. E. S. Fox Ltd. (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener) (*Withdrawn*)

1299-87-M: Canadian Union of Public Employees, Local 87 (Applicant) v. The Corporation of the City of Thunder Bay (Respondent) (*Dismissed*)

2389-87-M: Electrical Workers, Local 339 (Applicant) v. Thunder Bay Telephone (Respondent) (*Withdrawn*)

3329-87-M: Family & Children's Services of the District of Thunder Bay (Applicant) v. Canadian Union of Public Employees, Local 2296 (Respondent) (*Withdrawn*)

0560-88-M: Canadian Union of Public Employees, Local 57 (Applicant) v. Guelph General Hospital (Respondent) (*Dismissed*)

0719-88-M: The Corporation of the City of Barrie (Applicant) v. Canadian Union of Public Employees, Local 2380 (Respondent) (*Dismissed*)

1064-88-M: Madella Toop (Applicant) v. Ontario Nurses Association (Respondent Trade Union) v. Carleton Place & District Memorial Hospital (Respondent Employer) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1096-87-OH: Steve Mitchell (Complainant) v. Coreslab Ltd. (Respondent) (*Granted*)

2601-87-OH: Ron Murphy (Complainant) v. Domtar Inc. (Respondent) (*Granted*)

2602-87-OH: Pat Casey (Complainant) v. Domtar Inc. (Respondent) (*Granted*)

2603-87-OH: Don Chapman (Complainant) v. Domtar Inc. (Respondent) (*Granted*)

0119-88-OH: Mark Engleden (Complainant) v. Art Shoppe (Respondent) (*Granted*)

0328-88-OH: Hubert Charles Newsome (Complainant) v. Milrod Metal Products (Respondent) (*Withdrawn*)

0417-88-OH: Fred Drodge (Complainant) v. Toronto Transit Commission (Respondent) v. Amalgamated Transit Union, Local 113 (Intervener) (*Withdrawn*)

0418-88-OH: Lorne Davis (Complainant) v. Mr. Kurt Ogris, Thunder Bay Terminals (Respondent) (*Withdrawn*)

0565-88-OH: Irene Stoll (Complainant) v. Nour Trading House (Respondent) (*Dismissed*)

0618-88-OH: Debbie L. Mau (Complainant) v. Nour Trading House Inc. (Respondent) (*Withdrawn*)

1083-88-OH: Labourers' International Union of North America, Local 183; Dino Perri (Complainants) v. Comstock Canada Constructors (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2009-86-M: Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Granted*)

1806-87-G: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. Smith Bros. Excavating (Windsor) Ltd. (Respondent) (*Granted*)

1895-87-G: Resilient Floorworkers, Local 2965 (United Brotherhood of Carpenters & Joiners of America) (Applicant) v. Zeppa Tile Inc. (Respondent) (*Granted*)

2144-87-G: The National Elevator & Escalator Association (Applicant) v. The International Union of Elevator Constructors, Local 96 (Respondent) (*Withdrawn*)

2335-87-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Charles Carty (Grievor) v. Montgomery-Kone Elevator Company Ltd. (Respondent) (*Withdrawn*)

2336-87-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Gary Steele (Grievor) v. Montgomery-Kone Elevator Company Ltd. (Respondent) (*Withdrawn*)

2653-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2222 (Applicant) v. Prestige Acoustics Ltd. (Respondent) (*Withdrawn*)

2826-87-G; 2827-87-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Gerry Lowrey Ltd. (Respondent) (*Granted*)

2968-87-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

3383-87-G: Ontario Allied Construction Trades Council and its affiliate International Union of Operating Engineers and its Local 793 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro (Respondents) (*Withdrawn*)

0302-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Commonwealth Construction Ltd. Commonwealth Construction Company (1985) Ltd.; Commonwealth Pacific Consultants Ltd.; and Lac Minerals Ltd. (Respondents) (*Withdrawn*)

0303-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Ged-Ven Fabricating & Erection Ltd. (Respondent) (*Withdrawn*)

0316-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. S.C.A.I. Construction Ltd. (Respondent) (*Granted*)

0334-88-G: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Local & Canada (Applicant) v. Teaphilus Masonry (Respondent) (*Granted*)

0558-88-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. Mike's painting & Decorating A Division of: Mike McMahon's Painting & Decorating Ltd. (Respondent) (*Withdrawn*)

0651-88-G: Labourers' International Union of North America, Local 247 (Applicant) v. Cupido Construction Ltd. (Respondent) (*Withdrawn*)

0669-88-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 99538 Canada Inc., c.o.b. as B.C. Meck (Respondent) (*Granted*)

0905-88-G: Carpenters Local 249 Kingston, and The Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dalton Engineering & Const. (1974) Ltd. (Respondent) (*Withdrawn*)

0914-88-G: Labourers' International Union of North America, Local 607 (Applicant) v. G.M. Gest Inc. (Respondent) (*Withdrawn*)

0941-88-G: International Brotherhood of Electrical Workers, Local 586 of the IBEW Construction Council of Ontario (Applicant) v. Glebe Electric Ltd. (Respondent) (*Withdrawn*)

0942-88-G: International Brotherhood of Electrical Workers, Local 1687 of the IBEW Construction Council of Ontario (Applicant) v. Moore Electric (Sudbury) Ltd. (Respondent) (*Granted*)

0943-88-G: International Brotherhood of Electrical Workers, Local 303 of the IBEW Construction Council of Ontario (Applicant) v. O'Brien Installations Ltd. (Respondent) (*Withdrawn*)

0963-88-G & 0964-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Itarcan Construction Inc. (Respondent) (*Granted*)

0967-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. S & A Construction Co. Ltd. (Respondent) (*Withdrawn*)

0981-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Denovellis & Valente Concrete & Drain (Respondent) (*Withdrawn*)

0983-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Queen City Landscaping Ltd. (Respondent) (*Withdrawn*)

0991-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Resource Construction Ltd. (Respondent) (*Withdrawn*)

0993-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Flag Construction Company Ltd. (Respondent) (*Withdrawn*)

0995-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Luciani Bros Construction (Respondent) (*Withdrawn*)

0996-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cipriano Construction Ltd. (Peter Mar); Residential Framing Contractors' Association of Metropolitan Toronto & Vicinity Inc. (Respondent) (*Withdrawn*)

1026-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Taggart Construction Ltd. (Respondent) (*Withdrawn*)

1035-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Victor Carpentry (Respondent) (*Granted*)

1039-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. M. D. R. (619138) Ontario Ltd. (Respondent) (*Withdrawn*)

1061-88-G: Quality Control Council of Canada (Applicant) v. Accuspec Testing (Sarnia) Ltd. (Respondent) (*Withdrawn*)

1076-88-G: Labourers' International Union of North America, Local 1036 (Applicant) v. The Corporation of the City of Sault Ste. Marie (Respondent) (*Withdrawn*)

1081-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Moll & Wilson (Respondent) (*Withdrawn*)

1089-88-G: International Brotherhood of Electrical Workers, Local 105 of the IBEW Construction Council of Ontario (Applicant) v. Brantford Mechanical Ltd. (Respondent) (*Withdrawn*)

1091-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Franore Drain & Concrete Ltd. (Respondent) (*Withdrawn*)

1100-88-G: Labourers' International Union of North America, Local 607 (Applicant) v. Newman Bros. Ltd. (Respondent) (*Withdrawn*)

1112-88-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Marble, Tile & Terrazzo, Union Local 31 Affiliated with the International Union of Bricklayers & Allied Craftsmen (Applicants) v. Noranda Tile Co. Ltd. (Respondent) (*Granted*)

1121-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

1134-88-G: International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 736 (Applicant) v. Canal Contractors, Division of Canadian Shipbuilding & Engineering Ltd. (Respondent) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0156-87-U: Hamilton Automatic Vending Company Ltd. (Complainant) v. Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and its Local 576 (Respondents) (*Dismissed*)

0240-87-U: Donald R. Barratt (Complainant) v. P. J. Gernon, L. Gernon, S. McAlarey of Greenfield Painting Services (Respondents) (*Dismissed*)

1101-87-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Wallcraft Painting & Decorating Ltd. (Respondent) (*Dismissed*)

0607-88-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Wallcraft Painting & Decorating Ltd. and Cobean Painting & Decorating Ltd. (Respondents) (*Dismissed*)

2610-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Tactix Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

2883-87-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Fibracan, a Division of Innopac Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

0622-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Capital Construction Corporation (Respondent) (*Dismissed*)

1078-88-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Newmarch Mechanical Ltd. and The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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